

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)
) Chapter 11
W.R. GRACE & CO.,)
) Case No. 01-1139 (JFK)
)
) July 27, 2009
Debtors)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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11 Telephone appearance list read into the record starting at
12 page 4. Live appearances follow beginning on page 5. Parties
13 arguing are listed on cover.

14

15 Spellings not provided are phonetic.

Colloquy

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1 (Court in Session)

2 THE CLERK: All rise.

3 THE COURT: Good morning. Please be seated. Folks,
4 if you want to remove jackets, please do. We're trying to make
5 it cooler in here, and hopefully, that will work, but I don't
6 know when. So feel free.

7 This is the matter of W.R. Grace, bankruptcy number
8 01-1139. The list of participants by phone. Scott Baena,
9 Janet Baer, Daniel Beller, Ari Berman, David Bernick, Jeffrey
10 Boerger, Deanna Boll, Thomas Brandi, Elizabeth Cabreser,
11 Douglas Cameron, Linda Casey, Steven Church, Richard Cobb,
12 Tiffany Cobb, Jacob Cohn, Andrew Craig, Leslie Davis, Michael
13 Davis, Elizabeth DeCristofaro, Elizabeth Define, Martin Dies,
14 Terence Edwards, Lisa Esaylan, Sandy Esserman, Marion Fairey,
15 Theodore Freedman, Jeff Friedman, Robert Gilbert, Christopher
16 Grego, James Green, John Greene, Robert Guttmann, Barbara
17 Harding, John Harding, Sarah Hargrove, Sarah Harnett, Robert
18 Horkovich, Brian Kasprzak, Gentry Klein, Stuart Kovensky,
19 Matthew Kramer, Arlene Krieger, Lewis Kruger, Richard Levy,
20 Kevin Maclay, Peri Mahaley, Douglas Mannal, Nancy Manzer,
21 Robert Craig Martin, John Matthey, Garvan McDaniel, Alex
22 Mueller, Marty Murray, Kate Orr, Merrit Pardini, David Parsons,
23 Steve Peirce, Carl Pernicone, Margaret Phillips, John Phillips,
24 Mark Platt, Mark Plevin, Joseph Radecki, James Restivo, Richard
25 Riley, Andrew Rosenberg, Samuel Rubin, Alan Runyan, Jay Sakalo,

Colloquy

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1 Tancred Schiavoni, Allen Schwartz, Darrell Scott, Mark
2 Shelnitz, Michael Shiner, Walter Slocombe, Jason Solganick,
3 Daniel Speights, Shayne Spencer, Brian Stansbury, Theodore
4 Tacconelli, Edward Westbrook, Jennifer Whitener, Richard Wyron
5 and Rebecca Zubaty.

6 All right. I'll take entries -- oh, wait. One
7 second. I need -- here we go. All right. I'll take entries
8 in court, please.

9 MR. BERNICK: Good morning, Your Honor. David
10 Bernick for Grace.

11 MR. FREEDMAN: Theodore Freedman for Grace.

12 MS. BAER: Janet Baer for Grace.

13 MR. LOCKWOOD: Peter Lockwood for the ACC,
14 Your Honor.

15 MR. FRANKEL: Your Honor, Roger Frankel for David
16 Austern and PIFCR. Also with me is Jonathan Guy, my partner.

17 MR. PASQUALE: Good morning, Your Honor. Ken
18 Pasquale from Stroock for the Unsecured Creditors Committee.

19 MR. COBB: Good morning, Your Honor, Richard Cobb of
20 Landis, Rath & Cobb on behalf of the bank lender group.

21 THE COURT: Excuse me one second. Okay. Thank you.

22 MR. HORKOVICH: Robert Horkovich, insurance counsel
23 to the ACC.

24 MR. FENCH: Nathan Fench (phonetic) for the ACC,
25 Your Honor.

Colloquy

7

1 MR. HURFORD: Mark Hurford for the ACC.

2 MS. MAKOWSKI: Kitty Makowski from Pachulski for
3 Grace.

4 MS. TREVORROW: Tara Trevarrow, Bilzin, Sumberg for
5 the Property Damage Committee.

6 MR. TACCONELLI: Good morning, Your Honor. Theodore
7 Tacconelli for the property damage committee.

8 MR. MCDANIEL: Good morning, Your Honor. Garvan
9 McDaniel for Arrowood Indemnity. With me is Tancred Schiavoni
10 and Carl Pernicone.

11 THE COURT: One second, please. Okay. Thank you.

12 MR. BLABEY: Good morning, Your Honor. David Blabey
13 from Kramer, Levin -

14 THE COURT: I'm sorry. Is that microphone on? I'm
15 having an awful lot of trouble hearing everybody. I've known
16 the people, so -- most of the people so far. So I know who you
17 are, but I'm having difficulty with hearing you.

18 MR. BLABEY: Sorry. I'll speak up. David Blabey
19 from Cramer, Levin on behalf of the Equity Committee.

20 THE COURT: Thank you.

21 MS. COBB: Good morning, Your Honor. Tiffany Cobb on
22 behalf of the Scotts Company.

23 THE COURT: Is there something you can do to adjust
24 that microphone? I can't hear from that?

25 THE CLERK: No, Your Honor. I can -

Colloquy

8

1 THE COURT: Please do, because it's very difficult to
2 hear.

3 MR. COHN: Good morning, Your Honor. Let's try an
4 experiment. Daniel Cohn for the Libby claimants. Can you hear
5 any better now?

6 THE COURT: Not really. Thank you.

7 MR. COHN: It may just not be on.

8 THE COURT: I think it is, because when you move
9 aside, I can hear an echo, but it's just not loud. It's just
10 not coming back here. So yes. I normally don't want you to
11 shout, but maybe you need to. Okay, Mr. Cohn. Thank you.

12 MR. LEWIS: Good morning, Your Honor. I'm Tom Lewis.
13 I'm here on behalf of the Libby claimants.

14 THE COURT: Good morning.

15 MR. DEMMY: Good morning, Your Honor. John Demmy of
16 Stevens & Lee for Fireman's Fund Insurance Company and the
17 Olians insurers.

18 MR. PLEVIN: Good morning, Your Honor. Mark Plevin
19 on behalf of Fireman's Fund Insurance Company with respect to
20 its surety claim.

21 MS. DECRISTOFARO: Good morning, Your Honor.
22 Elizabeth DeCristofaro for Continental Casualty Company.

23 THE COURT: One second. Thank you. Good morning.

24 MS. ALCABES: Good morning, Your Honor. Elisa
25 Alcabes. I'm here with Mary Beth Forshaw for Travelers

Colloquy

9

1 Casualty --

2 THE COURT: I'm sorry. You're here with who?

3 MS. CAMPUS: Mary Beth Forshaw --

4 THE COURT: Okay.

5 MS. CAMPUS: -- for Travelers Casualty & Surety
6 Company.

7 MR. GIANNOTTO: Good morning, Your Honor. Michael
8 Giannotto for Continental Casualty Company.

9 MR. GLOSBAND: Good morning, Your Honor. Daniel
10 Glosband, also for Continental Casualty Company.

11 MR. BROWN: Good morning, Your Honor. Michael Brown
12 for OneBeacon America Insurance company, Seaton Insurance
13 Company, Republic Insurance Company, and GEICO.

14 MR. MILNER: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. MILNER: Robert Milner for General Insurance
17 company of America.

18 MR. SHINER: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. SHINER: Michael Shiner for certain London market
21 companies and for AXA Belgium.

22 MS. MCCABE: Good morning, Your Honor. Eileen McCabe
23 for AXA Belgium.

24 THE COURT: One second. Okay. Thank you.

25 MR. COCO: Good morning, Your Honor. Nathan Coco on

Colloquy

10

1 behalf of Fresenius.

2 THE COURT: Good morning.

3 MR. TURETSKY: Good morning, Your Honor. David
4 Turetsky of Skadden on behalf of Sealed Air Corporation.

5 MR. CRAIG: Good morning.

6 THE COURT: Good morning.

7 MR. CRAIG: Andrew Craig for Allstate Insurance
8 Company.

9 MR. CARIGNAN: Good morning, Your Honor. James
10 Carignan of Pepper, Hamilton for Long Acre Master Fund, Long
11 Acre Capital Partners, and BNSF Railway. Also with me in the
12 courtroom is my colleague, Ms. Linda Casey for BNSF.

13 MS. MILLER: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. MILLER: Kathy Miller for Kaneb.

16 MR. RICH: Good morning, Your Honor. Alan Rich for
17 the PDFCR.

18 MR. CASSADA: Good morning, Your Honor. I'm Garland
19 Cassada from Robinson, Bradshaw & Hinson. I'm here for Garlock
20 Sealing Technologies.

21 THE COURT: One second. Okay. Thank you. Good
22 morning.

23 MR. WAXMAN: Good morning. Jeff Waxman on behalf of
24 Garlock Sealing Technologies.

25 MR. WARD: Good morning. Matthew Ward of Womble,

Colloquy

11

1 Carlyle, the State of Montana.

2 MR. ROSENBERG: Good morning, Your Honor. David
3 Rosenberg of Kozyak, Tropin & Throckmorton representing
4 Anderson Memorial Hospital.

5 THE COURT: Good morning.

6 MR. SPEIGHTS: Good morning, Your Honor. Dan
7 Speights representing Anderson Memorial Hospital.

8 MR. LONGOSZ: Good morning, Your Honor. Edward
9 Longosz on behalf of Maryland Casualty and Zurich.

10 MR. WISLER: Good morning, Your Honor. Jeffrey
11 Wisler also on behalf of Maryland Casualty and Zurich.

12 THE COURT: Is that everyone?

13 (No verbal response)

14 THE COURT: Okay. Ms. Baer?

15 MS. BAER: Good morning again, Your Honor. Janet
16 Bear on behalf of the debtor. Your Honor, we have a couple
17 matters we just want to get rid of which will take a few
18 seconds, and then we'll get into the more meaty matters.

19 Judge, items 1 and 2 are claims related matters that
20 we're asking just be continued to the August hearing.

21 THE COURT: All right.

22 MS. BAER: Agenda item number 3, Your Honor, has been
23 resolved. It was a objection to the claim of Madison Complex.
24 It's been resolved for under \$50,000. So it needs no court
25 approval, and the stipulation has been filed. Your Honor, the

Colloquy

12

1 other matter --

2 THE COURT: One second, please.

3 MS. BAER: I'm sorry.

4 THE COURT: How is it going to get taken off of the
5 agenda? You'll just simply remove it?

6 MS. BAER: Yes.

7 THE COURT: All right.

8 MS. BAER: Your Honor, item number 7 is the next one
9 I'd like to take up. That will just take a moment. Item
10 number 7 is the debtor's objection to a claim filed by
11 Neutocrete Products, Inc. It is a contractual related issue.
12 It's -- there is no pending lawsuit anywhere. The issues came
13 up in the proof of claim. We've objected. Neutocrete has
14 responded. We are asking that that matter be sent to the
15 mediation process that we have put in place to try to resolve.

16 THE COURT: All right. So you'll just temporarily
17 take it off and put it back on when it's appropriate?

18 MS. BAER: That's correct, Your Honor.

19 THE COURT: All right.

20 MS. BAER: That takes care of the simple matters.
21 Oh, and item number 8, Your Honor, I forgot. Item number 8,
22 the debtor's objection with respect to the testimony and report
23 of Dr. Terry M. Spear. That is being continued, Your Honor, to
24 the August hearing.

25 THE COURT: All right.

Colloquy

13

1 MS. BAER: That then takes us back, Your Honor, to
2 item number 4, which is the debtor's motion for a protective
3 order related to the deposition of Mark Shelnitz, and
4 Mr. Bernick will address that.

5 THE COURT: Okay. Before you do, I want to do a
6 couple of housekeeping things before we get into the substance.
7 We're having some difficulty getting some PDF searchable
8 documents. We're also having trouble with people forgetting to
9 link pleadings, and I'm not getting document numbers and link
10 pleadings on orders.

11 With the volume of information that's being filed,
12 this is a significant problem, and if it doesn't get fixed,
13 after today, I'm striking the pleadings. There is a case
14 management order in place and a local rule here that governs
15 this, and I am not going to have any non-PDF searchable
16 documents, because we need to use them, and I'm not going to
17 have documents that don't have appropriate links and document
18 numbers placed on them, including the perspective orders.

19 So I hope everybody is very clear about this. It's
20 for your benefit as well as the Court's, but there is an order
21 in place that is for that purpose in making sure we can track
22 things, and I'm not going to permit them. I'm going to strike
23 the pleadings from henceforth.

24 In addition, we're getting an awful lot of late
25 filings, which I have pretty much been granting motions because

Argument - Bernick

14

1 of the plan confirmation process to expedite review, to get
2 them onto the upcoming agendas. I'm not doing that after this
3 month. You file things timely so that everybody can get
4 prepared, everybody can get prepared. So that's a warning.

5 Okay. Now, end of diatribe. So go ahead.

6 Mr. Bernick.

7 MS. BAER: Thank you, Your Honor.

8 MR. BERNICK: Well, on that note, Your Honor,
9 incidentally, is there -- is there a moving mic along here
10 someplace or -- there we go. While that's in process,
11 Your Honor, first of all, we appreciate your making so much
12 time available today. It's a very full agenda. There is a lot
13 of stuff to get done, and we do appreciate your accommodating
14 us by starting early in -- in the efforts obviously to also
15 move over the Flynn Coat (phonetic) matter, and I'll express my
16 appreciation to the Flynn Coat folks as well for agreeing to
17 that with such alacrity and so we can proceed today.

18 I've looked through the agenda today in order to make
19 a suggestion about how we can proceed in a way that preserves
20 kind of a logical flow of matters, because I think if we go in
21 the order of the agenda itself, we'll end up going kind of back
22 and forth a little bit, and for purposes of letting everybody
23 know what I am at least going to propose, subject to
24 Your Honor's approval, as an order to proceed is to begin with
25 item 4, then go to item 6. 7 and 8 are -- are no longer before

Argument - Bernick

15

1 us here this morning. We would then go to item 10, then item
2 9, then item 11, and then items 5, 12, and 13.

3 THE COURT: Mona (phonetic), could -- I left the
4 agenda on the conference table in that orange folder. Would
5 you -- oh, do you need it?

6 A FEMALE SPEAKER: No.

7 THE COURT: Okay. Thank you. All right,
8 Mr. Bernick. That's fine.

9 MR. BERNICK: So -- and basically, the idea is that 4
10 -- 4 and 6 are kind of separate more or less not preliminary
11 matters, but they -- they don't really go to the sequence of
12 events leading up to the confirmation hearing. Item 10 is a
13 status report on phase 1, which it would appear by logic should
14 take place before item 9, which is the pretrial conference with
15 regard to phase 2, and then items 11, 5, 12, and 13 are all
16 matters that really bear upon the pretrial order and
17 proceedings leading up to the confirmation hearing. Item 11
18 relates to the lenders, and then 5, 12, and 13 all relate to
19 the Libby claimant.

20 So that's basically the reason that we're -- we think
21 we should proceed in that fashion, and if that's all right, as
22 I think Your Honor has indicated that it is, I think we can
23 begin with item 4, and item 4 relates to -- it's our motion for
24 protective order, Grace's motion for protective order to bar
25 the deposition of our number one legal officer, Mr. Shelnitz,

Argument - Bernick

16

1 who's general counsel of the company.

2 The -- the orders necessitated in light of an effort
3 by Speights and Runyan on behalf of their claimants, and I'm
4 going to talk about who they're actually representing in this
5 regard in a moment, to depose Mr. Shelnitz, and the essence of
6 why we think that that should not take place is that all
7 matters relating to property damage have been more than
8 adequately covered by the testimony on deposition of Mr. Finke
9 on more than one occasion. Mr. Finke has been involved in
10 property damage litigation on behalf of Grace for years and
11 years and years. There is no person at the company who is more
12 familiar with property damage litigation than Mr. Finke.

13 Mr. Finke and Mr. Speights have been -- been
14 opponents and colleagues in settlement, opponents in litigation
15 for years and years and years. Mr. Finke has been deposed, and
16 all the questions that could have been asked by Mr. Speights
17 could have been asked with respect to Mr. Finke to the extent
18 that those questions are of consequence.

19 So that's the basic essence of what we have to say,
20 and let me then go back a little bit and talk about the context
21 of this, because it bears noting the position that Speights and
22 Runyan holds at this time and in this case.

23 I'm just going to go to the board for a second and
24 give Your Honor an indication of what it is that we're still
25 dealing with here and what it is that really prompts this

Argument - Bernick

17

1 desire to take Mr. Shelnitz's deposition.

2 Your Honor will recall the approximately 1,550 claims
3 that were filed by the Speights and Runyan firm were -- were
4 expunged due to late authority, no authority. There were
5 others that were withdrawn by Mr. Speights - Speights and
6 Runyan to the extent that there were issues concerning
7 authority. Mr. Speights says well, I'll wait.

8 There were approximately 44 additional claims that
9 were expunged as being late. That was affirmed by the Third
10 Circuit. There are 34 additional claims that were expunged.
11 They're Canadian claims. They were subject to the ultimate
12 statute of limitations. That matter is now on appeal.

13 Now, against that backdrop, there has been settlement
14 with Mr. Speights. If we subtract all of that, I think that
15 there are roughly 122 additional claims, and out of those 122
16 additional claims, 121 have been settled. The documentation is
17 in various stages. Some of them have already approved by
18 Your Honor, which means that we have one -- one claim that's
19 left insofar as I can turn that, and Mr. Speights will correct
20 me if I'm mistaken in that regard.

21 Anderson Memorial. Why should we not have another
22 opportunity today to extend the prolonged and multi-round
23 process of litigating issues that emanate from Anderson
24 Memorial? We should not deprive ourselves of that opportunity.
25 So we're here on Anderson Memorial again.

Argument - Bernick

18

1 Now, Mr. Speights in pursuing the Anderson Memorial
2 claim on behalf of his client is pursuing a claim that's styled
3 as a class action, and Your Honor is very familiar with the
4 extended process that we went through on discovery on that, the
5 class certification hearings, the effort to take an appeal.
6 Apparently, Anderson Memorial is very anxious not only to
7 pursue their claim, but to continue to pursue the idea that
8 it's a class action, indeed, a class action that is a
9 nationwide class action, i.e. a Federal class action, but the
10 complaint that Mr. Spikes has on behalf of Anderson Memorial is
11 that Anderson is not being treated fairly, and in particularly
12 in the code language, is not being given equal treatment, that
13 there is discrimination against Anderson. Why? Because under
14 the plan, the Anderson claim to the extent that it's pursued
15 has to be pursued post-confirmation before this Court in
16 Federal Court together with -- because this is -- in part,
17 because this is a Federal class action.

18 Mr. Speights on behalf of Anderson points out that
19 that's not fair, because future PD - what are current PD
20 claims. There are the expunged ones that are on appeal, but
21 beyond that, there are -- there is only one other current PD
22 claim, which I'll talk about in a minute. Virtually all the PD
23 claims that we're really talking about here any future PD
24 claims. I say any, because we don't believe that there is such
25 a thing as a future PD claim, but to the extent that there is,

Argument - Bernick

19

1 the plan documents call out that those claims can be pursued in
2 State Court. Bankruptcy Court no longer will -- will have
3 jurisdiction over the matter. They can be pursued in State
4 Court provided that the issue of whether they're really new
5 claims gets litigated in the first instance before the
6 Bankruptcy Court.

7 But Mr. Speights believes that the allowance or the
8 -- the provision that says that to the extent that future
9 claims really are future claims, they can be pursued in State
10 court where -- because there has been no other litigation
11 relating to them today -- shows that his client is being
12 treated in an unequal way.

13 Secondly, there is a current PD claim that goes down
14 -- back down to State Court. Indeed, it never came here, which
15 was the Solo case. The Solo case, we have a lift stay
16 treatment under the plan, and the reason for that is relatively
17 simple, which is that the Solo case was tried to verdict and
18 was -- either an appeal was taken on appeal. It's an appellate
19 status at the time the bankruptcy is filed, and basically, it's
20 been put on hold. So because that matter already was in
21 process in State Court and on appeal, there is absolutely no
22 sense in having it litigated before this Court.

23 So Solo is a very exceptional circumstance and the
24 Solo case under the plan stays in State Court. There is a lift
25 stay so that the appeal can proceed.

Argument - Bernick

20

1 Now, Mr. Speights is free to make his arguments
2 regarding discrimination and unfair treatment in the context of
3 the confirmation hearing. That is a legal issue. The facts
4 that are involved for a discriminatory treatment claim are the
5 facts of whether the treatment is unequal or not, and those
6 facts are apparent, apparent from the face of the plan, because
7 the plan calls out the different treatments that apply to all
8 different creditors, and Mr. Speights can make the argument
9 that he has made, in fact, which is that the requirement that
10 his -- Anderson claim remain before this Court post-
11 confirmation is a different treatment, not the same treatment
12 as other claims that are property damage claims.

13 THE COURT: Mr. Bernick, let me interrupt you for a
14 second. The only reason I can hear him is because he's using
15 the -- yeah. There doesn't -- there seems to be a problem with
16 the podium.

17 (Pause)

18 THE COURT: Maybe I wasn't close enough. Is that
19 okay? No? No different?

20 MR. BERNICK: Yeah. Okay. Thank you.

21 THE COURT: Okay. Thank you. I'm sorry,
22 Mr. Bernick. Go ahead.

23 MR. BERNICK: That's all right. That gave me an
24 opportunity to be corrected by Mr. Freedman. The difference in
25 the future PD claims is that they have -- and I remember this

Argument - Bernick

21

1 now from the negotiations. The original position was that they
2 should be negotiated in State Court, but, in fact, as a result
3 of the negotiation and the -- and the position that the debtor
4 took in that regard, the latitude is to have them in District
5 Court. They can be -- they must be in District Court, but the
6 latitude is that they can be in a District Court in another
7 jurisdiction. That's the difference. So it's not back down to
8 State Court.

9 The issue though of whatever the treatment is and is
10 it equal or not and is that inappropriate is a legal issue. We
11 have all the predicate facts that are necessary for that.

12 So on this legal issue, we don't believe that there
13 really is any need for discovery. That's point one. Point
14 two, we know that if any discovery commences from our long
15 experience in Anderson Memorial, there is no such thing when it
16 comes to Anderson Memorial as an agreement that actually
17 resolves the discovery dispute. There is almost no such thing
18 as a court order that actually definitively resolves the
19 discovery dispute. They keep on coming back and back and back
20 and back until finally says no. That's exactly what happened
21 with Anderson Memorial on class certification.

22 So with all of those -- with those two basic
23 problems, this is legal in nature and that we know that there
24 is no such thing as a short answer, we nonetheless took a look
25 to determine whether, in fact, there was a way -- what the

Argument - Bernick

22

1 different matters were that were being raised by Mr. Speights
2 to see, well, is there something there that moves this needle,
3 and the answer to that is no.

4 I have here and I think for ease of reference,
5 Your Honor, the second two columns are the ones that are most
6 important. We took a look at Mr. Speights's papers to see what
7 was the alleged need for Mr. Shelnitz's deposition, and we
8 wouldn't be making a big deal about -- agenda. The Judge needs
9 one.

10 MR. SPEIGHTS: I have an objection, Your Honor.

11 THE COURT: Thank you. Mr. Speights?

12 MR. SPEIGHTS: While this chart is not the end of the
13 world, several years ago, Your Honor ruled that anything put on
14 that board -- several years ago, Your Honor ruled that anything
15 put on that board must be shared at least 24 hours in advance,
16 and I have not seen this before.

17 THE COURT: All right.

18 MR. SPEIGHTS: Thank you, Your Honor.

19 THE COURT: Mr. Bernick?

20 MR. BERNICK: Yeah. Well, what's being shown is
21 Mr. Speights' own pleading. I could get up and write these
22 things. This is right out of his pleading, and this is simply
23 a summary of my argument. There is no new material. It is
24 simply a list. To say that this is a demonstrative in some
25 fashion means that -- and I compiled the list in order -- sure.

Argument - Bernick

23

1 I can go read all these things off, but I thought Your Honor
2 might want to keep track.

3 If Mr. Speights really wants to say to Your Honor
4 that this is something that is going to prejudice his argument,
5 I'll take it down, but to sit here and say oh, well, geez, this
6 is somehow prejudicial to his position I think is absurd.

7 THE COURT: Okay. Mr. Speights, I don't know yet
8 what it is. If it's something that is Mr. Bernick's
9 construction of what's out of your pleading, I think as he's
10 going through it, you can look at your pleading and tell me.
11 If it isn't, then I'll require that it be taken down. If it
12 is, I'm not sure that it's going to be anything other than a
13 summary of his argument.

14 MR. SPEIGHTS: Your Honor, I don't think it's
15 prejudicial. I don't think it's -- I think it's Mr. Bernick's
16 spin on the pleadings, but that's fine. I don't think it's
17 prejudicial. I'll withdraw my objection, but the next time I'm
18 here and try to put a summary up like I have in the past, I
19 just want to be able to remind Your Honor that Mr. Bernick has
20 been doing the same thing. That's fine.

21 THE COURT: If it's -

22 MR. SPEIGHTS: I withdraw the objection.

23 THE COURT: -- summaries of pleadings, okay. If it's
24 summaries of factual information, share it in advance.

25 MR. BERNICK: Thank you.

Argument - Bernick

24

1 THE COURT: That applies to everyone. Okay. Go
2 ahead.

3 MR. BERNICK: Termination of global settlement
4 negotiations in 2005 with Mr. Speights, Mr. Speights wants to
5 find out who done it and is that Mr. Shelnitz and why did he do
6 it, and the answer to that is it is totally irrelevant. What
7 issue does it go to? This is negotiation history. God knows
8 the negotiation histories have been -- in this case in all
9 respects have been marathon.

10 So we're picking out one feature, and he's asking for
11 the mental impressions of the general counsel and kind of
12 saying well, why did you do that. That's not a proper question
13 at this stage. Not only that, but it was covered in Mr.
14 Finke's deposition and it's moot.

15 Look who's sitting here now. However it happened,
16 God bless, we got virtually everything settled, and the only
17 thing that's left is one case. He wants to go back and revisit
18 history of what took place four years ago.

19 Development of strategy for all PD claims. That is
20 pure and simple privileged. What our strategy was, how we
21 decided to pursue this matter is not his business. It is flat
22 out privileged.

23 Negotiations regarding the proposed plan treatment of
24 PD claims, again, what is the relevance of that? We have --
25 with respect to discrimination is here it is. You have a

Argument - Bernick

25

1 treatment here and a treatment here. Is it discriminatory?
2 That's not a question of intent. That's not a question of vast
3 conspiracy. It is what it is. Is it discriminatory or not?
4 And it was covered in the Finke deposition.

5 Understand Grace's position regarding his objections.
6 Mr. Finke was deposed twice, once as an individual for a day by
7 Mr. Speights, and then as a 30(b)(6) witness where Mr. Speights
8 apparently failed to -- to make the notice of the 30(b)(6)
9 deposition, but he had the opportunity to ask for Grace's
10 position regarding his objections of Mr. Finke, and, in fact,
11 we stated our position with respect to his objections.

12 Negotiation with planned proponents regarding PD
13 claims. Mr. Inselbuch was asked flat out, well, you know, what
14 was the discussion about that, and his answer was pretty
15 simple, which is he said this is Grace's problem, PD is Grace's
16 problem. That's the end of it. What more is there to find
17 out? Well, he wants to then go back and find well, what did
18 Grace decide to do.

19 He's already gotten the discovery vis-a-vis
20 discussions with the plan proponents. So that's really a
21 reinvented request to get well, what is it that Grace did, and
22 we've already told him what Grace did.

23 Negotiations regarding the ZAI agreement. Of what
24 relevance is that to the discrimination claim? And the ZAI
25 agreement was not only negotiated. It was embedded in a class

Argument - Bernick

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1 settlement. That's been gone through with -- with numerous
2 people. Mr. Finke has been deposed twice on that subject.

3 And finally, Grace's justification for the alleged
4 disparate treatment of Anderson in the plan, disparate
5 treatment of Anderson, the plan. Well, the question of whether
6 there is disparate treatment is answerable from the face of the
7 documents. The justification is a legal justification. It's
8 not a question of somebody's subjective intent. It's not a
9 question of what our strategic considerations were.

10 If there were something that really was discreet,
11 factual, and really was material to the issue that's been
12 raised and not discovered, God knows, even though Mr. Speights
13 has had the opportunity to inquire about it, we'd give it to
14 him, but that's not what this is. This is Mr. Speights for
15 whatever reason now going after Mr. Shelnitz as the GC to find
16 out well, why is it that -- well, you settled 121 cases, why
17 didn't you settle this case, and maybe it's because somehow we
18 don't like him or there is some kind of conspiracy. That is --
19 that's the real reason for this inquiry. That is what it
20 invites, and we don't believe it's appropriate, and therefore,
21 we know it's a discovery matter and Your Honor is generally
22 pretty flexible on discovery, but we just don't see it here.
23 This harassing discovery.

24 THE COURT: Mr. Speights?

25 MR. SPEIGHTS: Good morning, Your Honor.

Argument - Speights

27

1 THE COURT: Good morning.

2 MR. SPEIGHTS: I came to Wilmington today to argue a
3 discovery matter whether I'm entitled to take a deposition.
4 The burden is on Grace to prohibit my taking the deposition of
5 Mr. Shelnitz. I'm not going to, unless Your Honor wants to
6 direct me to, head down the confirmation battle, nor am I going
7 to spend my time correcting the plethora of mathematical
8 mistakes made by Mr. Bernick on his board.

9 Back when we had to list witnesses preliminarily in
10 April, I listed two witnesses by name, Mr. Finke and
11 Mr. Shelnitz. Mr. Finke was a person that I dealt with in
12 South Carolina regarding the Anderson case. Mr. Shelnitz took
13 over as general counsel some time in early 2005.

14 I did take Mr. Finke's deposition and I learned some
15 valuable things that I think will assist Anderson when it
16 opposes confirmation at the hearing in September. I then
17 noticed Mr. Sheltnitz's deposition, and low and behold, they
18 filed this motion for a protective order.

19 Now, Mr. Shelnitz is not some head of a company that
20 has no involvement in anything. Mr. Shelnitz has been the
21 major person involved in these -- in the plan development going
22 back to 2005. He negotiated the deal with the PI claimants.
23 He negotiated the deal and signed the term sheet for the ZAI
24 claimants. He supervised the claims objections process, and
25 indeed, in something I did not mention in my brief but I just

Argument - Speights

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1 thought about Saturday. I went to Pacer and looked and word
2 searched Mr. Shelnitz and found that he has filed or Grace has
3 filed a number of pleadings with declarations of Mr. Shelnitz
4 in which Mr. Shelnitz identifies himself as the person at
5 Grace, starting in pleadings in 2005 and going until recently,
6 as the person in charge of the claims process or claims review
7 with respect to objections at W.R. Grace. So this is not some
8 wild idea that I'm taking a person not involved.

9 In any event, I noticed his deposition. Big deal.
10 Two witnesses I listed originally. I noticed his deposition
11 for several reason. Number one, I wanted discovery. That's
12 what lawyers do. I wanted to understand Grace's position so I
13 could decide what witnesses and what documents did I need, and
14 I wanted to understand Grace's position on several plan
15 confirmation issues, that by the time I noticed him I had
16 raised along with the Kozyak firm and our objections which we
17 filed in May. So I wanted pure discovery.

18 In addition, Your Honor, I anticipated that Grace
19 might call Mr. Shelnitz as a witness in this case. Whether it
20 did or did not, I would have sought his deposition, but if it
21 did, I wanted to know early on what he was going to say about
22 several issues so that I could be prepared to cross-examine him
23 and prepared to gather documents of what other information I
24 needed if he turned out to be a witness.

25 Now, Your Honor, at some point, it's reflected in --

Argument - Speights

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1 in the briefs, Grace listed Mr. Shelnitz as a witness in
2 response to the insurer's 30(b)(6) notices of deposition, and
3 then when I started trying to depose him, they withdrew him as
4 a witness on the 30(b)(6). I'm not sure of the sequencing,
5 whether my noticing had something to do with that or not, but
6 they -- they at one time had him listed as a 30(b)(6) witness,
7 and I could have gone there and cross-examined. I don't have
8 to serve my own notice as a party in this case in order to have
9 the right to participate in depositions.

10 In any event, Grace filed a motion for protective
11 order, and they have the burden. Well, Your Honor, then
12 something else happened that, frankly, mystifies me.
13 Your Honor in an order -- that doesn't mystify me, your order,
14 but requiring plan submissions, and Grace had to file plan
15 submissions on July 20th. That's after all the briefing on
16 Mr. Shelnitz, and after I read the plan submission, I, frankly,
17 thought, Your Honor, I was going to get a telephone call from
18 Mr. Bernick or Ms. Baer or somebody over there on the side,
19 maybe even the quiet Mr. Lockwood would call me and say -

20 A MALE SPEAKER: I don't know a quiet Mr. Lockwood.

21 MR. SPEIGHTS: He's gotten might quiet these last few
22 months. And low and behold, right in the plan submissions,
23 Grace listed witnesses. Mr. Shelnitz is listed as a witness.
24 After identifying him, it says a number of things.

25 "Mr. Shelnitz may also testify in support of the plan

Argument - Speights

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1 proponent's contention that the plan of
2 reorganization is proposed in good faith pursuant to
3 the Bankruptcy Code."

4 Now, this is a witness that Anderson may see in
5 September at the confirmation hearing, a witness that we first
6 noticed for deposition back in May. Now, I don't understand
7 this. I don't understand how Grace after it files a motion for
8 protective order can list Mr. Shelnitz as a witness on good
9 faith and I can't take his deposition on good faith, because
10 that's what it goes to.

11 And I can sit up here an hour and a half talking
12 about the history of Anderson and everything else, but I
13 shouldn't have to justify taking a witness's deposition who's
14 listed nor should Grace be able to say well, we'll decide, you
15 know, the night before he testifies whether we're really going
16 to use him. People list witnesses. I list witnesses all the
17 time. I don't call every witness I list. Your Honor wanted to
18 get it down to bare bones though. This is their bare bone
19 witness list with Mr. Shelnitz on it, and I shouldn't have to
20 wait until the night before, because if I take his deposition,
21 I may need to add a witness. I may need to add documents. I
22 may need to come up with thinking on our position, and I just
23 rest on this, Your Honor. I would love to respond to
24 Mr. Bernick, but we've got a limited amount of time today, but
25 if they can list a witness and I can't depose him, then the

Argument - Bernick

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1 rules are not what I think they are.

2 THE COURT: Mr. Bernick?

3 MR. BERNICK: Yeah. Mr. Shelnitz was listed. He was
4 listed pursuant to Your Honor's direction that we do so, and he
5 will testify as to the matters that we have listed on the left-
6 hand column, because frankly, with respect to these, he is not
7 only the best person but may also be the only person, and to
8 the extent that we've done that, yes, we've opened the door
9 with respect to that.

10 Yes, we did list him on good faith, and then it did
11 dawn on us that of all the people that were going to take
12 advantage of that to pursue the kind of discovery that should
13 not be triggered by a disclosure with respect to good faith,
14 Mr. Speights was certain to walk through that door, and
15 therefore, we amended -- we have just amended our pretrial
16 submission to withdraw Mr. Shelnitz on good faith. It's not
17 worth the candle to have Mr. Shelnitz now with that hook be
18 used to go back through the long history of how -- what Grace's
19 strategies were with respect to Mr. Speights.

20 Good faith does not permit that kind of inquiry.
21 Good faith says have you negotiated this plan earnestly, have
22 you negotiated it at arms length, have you produced a result
23 that is a result that says yes, this debtor in good faith is
24 trying to resolve as much of its liabilities as it can and
25 emerge, and we're very confident that if Mr. Shelnitz were

Argument - Bernick

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1 produced on that subject and the examination was confined to
2 that, we wouldn't have a problem, but that is not what is
3 happening here. What is happening here is you can see it.
4 This is a conspiracy theory deposition. This is let's get the
5 general counsel. It's not good enough what Grace says in its
6 papers about its legal position. It's not good enough what
7 Mr. Finke says in the deposition. Mr. -- Mr. Speights wants
8 the opportunity to beat Mr. Shelnitz above the -- about the
9 head and shoulders on why in my one claim out of 122 claims,
10 out of -- I mean, you talk about good faith, the thousands of
11 claims, the enormous expenditure of time that's been dedicated
12 to litigating with Mr. Speights. He now wants to say well, I
13 want one more crack at the general counsel.

14 What's missing here -- what's missing here is a
15 specific showing, a specific showing that says that these kinds
16 of matters are germane to Mr. Speights' clients with respect to
17 an issue that is an appropriate legal issue. Discrimination
18 doesn't require it. That's simply a question of whether the
19 treatment is the same or not and why, and we have -- we'd
20 absolutely be able to account for that based upon the
21 documents.

22 And the question of good faith, I mean, the whole
23 negotiation with respect to PD has shown good faith. Not only
24 have we settled everything with Mr. Speights. We've settled
25 everything with everybody. There can be no issue about our

Argument - Bernick/Speights

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1 good faith.

2 So what is this? This is an effort to take this
3 opportunity to create pressure and leverage, perceived leverage
4 with respect to this one client where Mr. Speights has said
5 well, they're not going to settle, we're going to keep him in
6 the game, we're going to make as much trouble as we can.

7 I know Your Honor is not generally interested in
8 motivations. The real question here is the law. You don't
9 depose a lawyer without a specific showing of need.
10 Mr. Shelnitz is a lawyer. There has not been a specific
11 showing of need. We've given him the factual discovery he's
12 entitled to. This is now an excuse to basically interrogate an
13 opponent, an opponent who is a lawyer, and that is outside the
14 limits.

15 THE COURT: Mr. Speights.

16 MR. SPEIGHTS: I admit I'm a little hard of hearing,
17 Your Honor. Did Mr. Bernick -- and I don't address -- cross
18 talk down here. I don't deal in cross talk, but did
19 Mr. Bernick say that Mr. -- he's amending orally?

20 THE COURT: No. I think he said he filed an
21 amendment.

22 MR. SPEIGHTS: Filed? When was this amendment filed?
23 I've never seen it, Your Honor. I've come all the way, 8-hour
24 trip to Wilmington, Delaware to argue this motion primarily.
25 I've never seen such an amendment.

Argument - Speights

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1 MR. BERNICK: I stand corrected. It's not been
2 amended yet.

3 MR. SPEIGHTS: Well, should I argue -- should I argue
4 to state of the record if it is or state of the record in
5 Mr. Bernick's mind?

6 THE COURT: If you're going to call Mr. Shelnitz as a
7 witness on good faith, you clearly have the right to take his
8 deposition on the issue of good faith. If they're not going to
9 call him as a witness on good faith, then I think the issue
10 will be moot as to him, because they're withdrawing and not
11 calling him on the issue of good faith, but I didn't understand
12 that that's where your objection was heading. So I apologize
13 if that's the case. Maybe you better readjust my thinking
14 process.

15 I thought that what Anderson was saying was that
16 because it is going to be forced to resort to a hearing before
17 this Court as opposed to wherever else, the other property
18 damage claims if they ever are proven to exist have to go, that
19 that was discriminatory. Is there more to it than that?

20 MR. SPEIGHTS: Yes, Your Honor, and I will address
21 that, and Mr. Rosenberg is also here to the -- to the extent I
22 have to walk over to the bankruptcy world from -- from where we
23 are. Let me make two comments before jumping into that.

24 I do disagree respectfully with Your Honor's
25 suggestion that if they withdraw him as a good faith witness,

Argument - Speights

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1 I'm not entitled to take him. I noticed his deposition before
2 they listed him as a good faith deposition and proving, in
3 effect, bad faith, I want to get the discovery from
4 Mr. Shelnitz, who's been at the heart of all of the matters
5 that I raised came about starting in 2005.

6 So whether he does or does not withdraw him, I have
7 that issue. I also say that even if he amends -- I think what
8 Mr. Bernick is imagining he is going to file is something to
9 delete the sentence about good faith from this pleading but
10 leaves Mr. Shelnitz as a witness, and if he leaves him as a
11 witness, I still have a right to depose him like every other
12 person in this courtroom --

13 THE COURT: Well, that's true.

14 MR. SPEIGHTS: -- and I will be there, and he can --
15 Mr. Bernick certainly is capable of making his objections and
16 et cetera, et cetera, but he's going to be deposed, and I
17 didn't hear Mr. Bernick say that he is going to withdraw
18 Mr. Shelnitz as a witness.

19 THE COURT: No, and I agree with that, Mr. Speights.
20 If he's listed as a witness, he can be deposed.

21 MR. SPEIGHTS: Right.

22 THE COURT: I think the issue will be whether or not
23 the -- that if he's not listed to testify as to a particular
24 issue, and for this purpose, let's just say on good faith, then
25 the question is whether the deposition that goes to issues

Argument - Speights

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1 concerning good faith will be calculated to lead reasonably to
2 discoverable and admissible evidence, and it may or it may not.
3 I don't know the context at this point in time, but it clearly
4 wouldn't be as relevant as it will be if he is listed as a
5 witness to call in good faith. Then I don't think you have the
6 relevance issue to worry about at all.

7 MR. SPEIGHTS: And typically, Your Honor, that if we
8 were deposing him, because he is a witness and we try to go
9 into an area which the opponent objects to, that's the time you
10 have the motions filed and argued. Typically, matters are
11 taken in a deposition and we get through them in less time than
12 it's taken the parties to argue this matter here before you
13 today.

14 THE COURT: That's --

15 MR. SPEIGHTS: So, I mean, that's the typical way to
16 do it, but let me go back to your question since you asked
17 about where we're coming from. I'll put it in the
18 nonbankruptcy language.

19 If I call my client, Anderson Memorial Hospital, the
20 hospital itself, and I say under the plan that the debtor has
21 proposed, this is what's going to happen. You are going to
22 have a trial post-confirmation before the Bankruptcy Court
23 probably in Pittsburgh. They will probably -- more discovery,
24 despite the fact that we had discovery for years in South
25 Carolina, and then you and the hospital witnesses familiar with

Argument - Speights

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1 the problem and what's been done will have to go to Pittsburgh
2 for a trial. In addition, the experts at Anderson retain --

3 THE COURT: I'd actually love to try a case in South
4 Carolina, Mr. -- Mr. Speights. So if you can make an effort to
5 get a courtroom in South Carolina and that's the only part of
6 this, I'm game.

7 MR. SPEIGHTS: Well, I probably could get a courtroom
8 in beautiful Hampton, South Carolina, Your Honor, but -- but
9 assuming arguendo that that's not an option, although if the
10 debtor wants to put that on the table, we'll add that to the
11 smorgasbord of possibilities, it means that we also have to
12 bring our experts who are typically in the Anderson area,
13 including Atlanta, which is an hour and 45 minutes away, and
14 we'll all have to go, and I don't think you'll take three weeks
15 to try the case like most cases tried in the tort system, but
16 you won't have a jury, but we'll try it nonjury before you for
17 some period of time, and Your Honor will reach a decision.

18 Now, at the same time, I will tell -- and I will tell
19 my client now, the good news is if you win before Judge
20 Fitzgerald, you get 100 cents on the dollar. Well, one thing I
21 do know more about than I believe anybody in the courtroom, not
22 many things, but one thing is I know asbestos property damage
23 clients. I know what they think and how they feel.

24 What if I told my client well, instead, maybe I'll
25 try to talk Judge Fitzgerald into letting you be treated like

Argument - Speights

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1 the asbestos personal injury claimants. There isn't going to
2 be a 524 trust, and I believe if we can be that -- treated like
3 them, I will be able to participate in drafting the trust
4 procedures and then the claims will be decided, your claim will
5 be decided not by Judge Fitzgerald but will be decided by
6 trustees, which, by the way, I'm going to have an opportunity
7 to participate in choosing, and then if I don't like that
8 result, ultimately, we can go to the tort system. Now, the bad
9 news is you don't get -- you don't get 100 cents on the dollar,
10 but the good news is you get this low cost transactional
11 method, you never have to travel anywhere, and we'll file the
12 claim forms and move it on, or there is also this ZAI trust
13 over here, same thing. They don't get 100 cents on the dollar
14 either, but they get to pick their trustees. They get to write
15 their own procedures. It's low transactional cost, and maybe
16 you could be treated like that.

17 Well, I haven't asked Anderson that specific
18 question, but I'll guarantee you 90 percent of the claimants in
19 the country would prefer going to one of these trust routes and
20 be able to stay home. It's a practical thing beside being a
21 legal issue.

22 And I want to ask Mr. Shelnitz, I want to ask Grace,
23 I want to cross-examine witnesses at trial why Anderson is
24 deprived of that opportunity, but I also want to ask why future
25 all PD claims, Mr. Rich's clients, his clients' clients, all

Argument - Speights

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1 future PD claims, under the PDCMO, which is part of the plan,
2 which was amended in negotiations between the debtors and
3 Mr. Rich -- originally, Mr. Rich's clients, Judge Sander's
4 clients, were going to be treated the same way as Anderson, but
5 it go amended in negotiations I believe Mr. Shelnitz is very
6 aware of if he -- if he, in fact, did not participate in.

7 So they got amended, and Judge Sanders' traditional
8 PD claimants who are getting 100 cents on the dollar, if they
9 are really futures, and you decide that, get to go back to the
10 tort system in the district where they are. There is a federal
11 courthouse in Anderson, South Carolina. Okay?

12 But only Anderson, only Anderson -- and I don't think
13 I'm paranoid to say this. It's a fact. Only Anderson is
14 treated in what I consider, what my lawyers tell me is a
15 disparate way.

16 We don't have to decide that today. I think it's a
17 disparate treatment. I also think it's produced not in good
18 faith, because I think there is a lot of history here, and it
19 must be placed in context. I don't take long depositions. I
20 took Mr. Finke's deposition and finished in mid-afternoon, and
21 the insurers all had their questions of them, and we all
22 finished in that day.

23 I'm not looking to keep the general counsel of Grace
24 involved in some deposition of mine that goes on endlessly. I
25 know exactly what I want to ask. The know exactly what I want

Argument - Speights

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1 to ask. I want to get to the heart of this matter concerning
2 the disparate treatment of Anderson and how it came about that
3 Anderson is treated this way, and to the extent that history is
4 relevant to place it in context, I want to ask history, and
5 they can -- they can make all the objections there, and we can
6 call you on the phone like the rules provide and say we've got
7 a discovery dispute, Judge.

8 THE COURT: Oh, am I looking forward to that,
9 Mr. Speights.

10 MR. SPEIGHTS: Well, they won't do it. You know,
11 it's a chicken little argument is what it is, Your Honor. Have
12 you seen us arguing anything on the depositions. I've just
13 participated in six or eight depositions, and low and behold,
14 we've had a few cross words at those depositions. Okay?

15 MR. BERNICK: Not between you and I. Just --

16 MR. SPEIGHTS: Mr. Bernick doesn't cover these
17 depositions.

18 MR. BERNICK: Very disappointed. Very disappointed.

19 MR. SPEIGHTS: Okay. I mean, but we brought none of
20 this to your attention. I -- I would almost bet the moon that
21 we'll go take Mr. Shelnitz, it will be a very polite
22 deposition, we'll get to the heart of the matter, and then at
23 confirmation, we'll argue the merits, but again, he is still
24 listed as a witness, and I need to take him sooner rather than
25 later, because I need to know how to build our case, and I know

Argument - Bernick

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1 the minute I list another witness, Mr. Bernick is going to
2 raise cane, too late, too late. Thank you, Your Honor.

3 THE COURT: Okay. Mr. Bernick, quickly.

4 MR. BERNICK: Very, very briefly. Very revealing.
5 We now have a statement on the record about what the -- in
6 common sense terms, what the beef is, and the beef is well, PD
7 is different, just like I said he would say, ZAI is different,
8 just like I said he would say, and PI is different.

9 He said well, why am I not treated the same way, and
10 the answer is pretty simple, which is that we have a settlement
11 with the personal injury claimants, lots of back and forth,
12 lots of compromise and had to take place pursuant to a trust
13 structure that's very, very important to the PI claimants, and
14 we settled with them. We own a settlement with Anderson
15 Memorial.

16 We respect to the PD futures, we have a settlement
17 with respect to the PD futures that covers them as well. With
18 respect to ZAI, we have a settlement with respect to ZAI. So,
19 of course, in the context of settlement, settlement,
20 settlement, lots of things can happen. Lots of variables get
21 discussed, including the question about where current or future
22 claims would actually be resolved or actually be litigated.

23 And so the real question is Mr. Speights is asking
24 well, why don't you all do that for me. Well, first of all, we
25 could settle with Mr. Speights and we have settled with

Argument - Bernick/The Court - Decision

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1 Mr. Speights, and he can't claim that we're in bad faith with
2 respect to not settling with him, because one out of 122 is all
3 that we're left with. That's a pretty high success rate, and
4 we've settled with everybody else, everybody else. There is no
5 issue about the desire of this client to settle including with
6 Mr. Speights' clients notwithstanding all that he's done in
7 this litigation.

8 So what he really wants to say is well, even though I
9 haven't settled Anderson, I want you to give me something on
10 Anderson that will make me happy. Okay. Well, he can come to
11 us and make the proposal that says even though we haven't
12 settled Anderson, give me something that will make me happy,
13 and I guess that's a settlement proposal. Maybe he wants to
14 make it, but he can't take a deposition of Mr. Shelnitz and put
15 that proposition to him in a deposition. A deposition is not
16 the venue for making settlement proposals and finding out
17 whether the settlement proposals are acceptable or not, and it
18 is most certainly not appropriate to go back over this whole
19 history and say well, why did you do this and why did you do
20 that and why did you do that. That's settlement strategy.
21 That's litigation strategy. That's not his business.

22 And now we have heard exactly what he wants to do and
23 we know why it is wrong.

24 THE COURT: Okay. To the extent that Mr. Shelnitz is
25 listed as a witness on behalf of the debtor, he's clearly open

The Court - Decision

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1 and available for deposition. I don't think there -- anyone
2 can dispute that fact. To the extent that the purpose is
3 Mr. Speights' deposition notice that is directed to looking at
4 discriminatory treatment of Anderson Memorial. I think that is
5 clear from the face of the plan. I mean, I think the issue is
6 clear from the face of the plan. I'm not sure it is factual as
7 much as it is a legal issue. There is different treatment, and
8 the question of whether that is discriminatory I think is a
9 legal conclusion that has to be drawn.

10 The efforts to discover the debtor's settlement
11 strategy is clearly improper. The Court would -- that would
12 certainly not be able to be admissible evidence under the rules
13 of procedure. So that -- there is no purpose to exploring that
14 issue.

15 With respect to good faith, bad faith, however, if
16 Mr. Shelnitz has information that would lead either to a
17 construction of good faith or bad faith, it seems to me once
18 he's called as a witness, the areas of inquiry are not
19 necessarily limited to his direct testimony by way of cross-
20 examination, and so I think the area is opened in that respect.
21 Now, I don't know how far. There have to be some limits, but
22 nonetheless, that could be an appropriate area for cross-
23 examination if he's called as a witness.

24 So I think the appropriate thing at this point is to
25 say that. Mr. Shelnitz has to be made available for deposition

The Court - Decision

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1 as long as he's going to be called as a witness, and rather
2 than striking Mr. Speights' deposition notice because
3 Mr. Shelnitz is being listed as a witness, I'm going to allow
4 the deposition to take place. I'm not going to determine the
5 parameters other than what I have currently addressed on the
6 record. I don't think settlement strategy or litigation
7 strategy is appropriate in any event. It would be either
8 privileged or not admissible under the various rules, but to
9 the extent that it's getting to good faith, I can't make that
10 determination in this vacuum.

11 So I will not strike the deposition notice, but I am
12 to a certain extent limiting the areas of inquiry from some of
13 those that are listed in the notice. Do you need a specific
14 order on this issue or do you simply want me to continue it
15 until the next Omnibus to make sure that, in fact, something
16 happens with respect to this deposition?

17 MR. BERNICK: We're satisfied with Your Honor's
18 statements from the bench.

19 MR. SPEIGHTS: I think we probably need an order even
20 if it just says as stated on the bench, from the bench. I rise
21 only to say -- and may be -- are we still going to have a break
22 for Flynn Coat, Your Honor?

23 THE COURT: No. I was able to get the parties to
24 agree to submit orders.

25 MR. SPEIGHTS: I would like to suggest then at the

The Court - Decision

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1 break -- I assume you'll take a break at some point?

2 THE COURT: Yes. I will be.

3 MR. SPEIGHTS: That -- to see whether we can agree on
4 a date for the deposition. I'm loathed to leave Wilmington
5 today without some date, because I've been trying since May,
6 and perhaps they could contact Mr. Shelnitz and find an
7 agreeable date, but -- but I really want the deposition so that
8 I don't -- I'm not forced to come in here late asking for leave
9 of Court to do other things.

10 MR. BERNICK: Yeah. We'll -- a lot of people are
11 going to attend that deposition. I don't know when it's going
12 to be. We'll submit -- we'll circulate dates or a potential
13 date and see. With all that important, I'm sure that
14 Mr. Speights will make himself available, but we've undertaken
15 to make Mr. Shelnitz available for a timely deposition in
16 connection with the phase 2 proceedings in this case.

17 THE COURT: All right. If Mr. Shelnitz can be made
18 available I think within the next two weeks. Why don't we
19 simply set a two-week deadline to get it done? That way --

20 MS. BAER: He is out of -- Your Honor, Mr. Shelnitz
21 is going on -- out of town for about ten days. I do have a
22 couple of dates --

23 THE COURT: Okay.

24 MR. BAER: -- in August however that I can provide.

25 THE COURT: In August? Fine. Then why don't I

Argument - Cohn

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1 simply say by the end of August. That should be sufficient
2 time if he's not going to be --

3 MR. BERNICK: That's fine.

4 THE COURT: -- available. Mr. Speights, it will have
5 to be taken by the end of August at a date that is yet to be
6 determined by the parties. Okay. I'll take an order then when
7 you two can draft one that simply says that the rulings on the
8 record are the rulings of the Court with regard to this motion.

9 MR. BERNICK: Thank you, Your Honor. The next item
10 on the agenda is item 6, and I think that that really has
11 essentially two parts to it. One, the preliminary part, are
12 motions that have been filed by the -- on behalf of the Libby
13 claimants with respect to deferring this matter and also
14 discovery. Obviously, we very actively resist and oppose those
15 motions and want to get to the real event from our point of
16 view, which is the Court's approval of the settlement with
17 Arrowood, and because it is the claimant's motion -- so I would
18 propose that we proceed first with the claimant's motion and
19 then proceed with our motion for approval, and if that's
20 satisfactory, I think it's up to Mr. Cohn to go first and talk
21 about their motions if that's all right with Mr. Cohn.

22 MR. COHN: Yes, sir.

23 THE COURT: Good morning.

24 MR. COHN: Good morning again, Your Honor. There are
25 actually two Libby motions, but they're interrelated,

Argument - Cohn

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1 Your Honor, and we can probably streamline things by dealing
2 with the two preliminary motions all at once.

3 The relationship is this. There is a motion to defer
4 consideration of the Royal settlement motion until a time when
5 the Libby claimants have completed discovery, and then there is
6 a motion to compel related to the discovery that remains
7 uncompleted. So with your permission, may I address both?

8 THE COURT: Yes.

9 MR. COHN: Okay. The -- a key issue underlying the
10 Royal settlement is just what coverage is there out there that
11 is being settled. Everybody acknowledges that there are two
12 excess policies that -- that are out there as of right now and
13 that are being settled under this -- under this settlement.
14 However, there is also the Libby claimants' contention that
15 there is unsettled primary coverage for nonproducts claims.

16 This, Your Honor, dates back to a series of ten years
17 of -- of insurance policies issues by Royal to the Zonolite
18 Company which Grace then acquired. Zonolite Company was the
19 prior owner of the -- prior owner -- I'm sorry -- of the Grace
20 facilities in the vicinity of Libby, Montana.

21 This -- as I say, it's primary insurance. It means
22 that you don't have to -- it pays the first dollars,
23 Your Honor. There is no other insurance that would need to be
24 accessed first. It clearly covers by -- by the terms of the
25 policies products and nonproducts claims.

Argument - Cohn

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1 The types of claims, however, that our clients have
2 -- so the products claims are irrelevant, Your Honor. The
3 types of claims that our -- our clients are primarily asserting
4 are nonproducts claims, in other words, claims that result from
5 Grace's operations, not its products.

6 There are two basis on which we argue that this
7 coverage is still outstanding. One of them is that the 1995
8 settlement agreement which indisputably settled Royal's
9 products coverage is at the very least ambiguous on the issue
10 of whether it settled nonproducts coverage as well, and in that
11 circumstance, Your Honor, of course, it's hornbook law.
12 Extrinsic evidence may be introduced, and what we've done is
13 we've tried to explore the extrinsic evidence, and there has
14 been one key element of discovery that has been resisted, and
15 that is production of drafts of the 1995 settlement agreement.

16 Those have been withheld expressly, Your Honor. This
17 is -- in fact, I don't even know if they exist, because we --
18 what Royal has said to us is that they will simply not produce
19 them whether they exist or not, and so that's clearly something
20 that is relevant to this.

21 THE COURT: Why? The -- the settlement in the case
22 that it is the full agreement of the parties notwithstanding
23 anything that took place beforehand. So why are the drafts
24 relevant?

25 MR. COHN: Oh, because, Your Honor, the settlement

Argument - Cohn

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1 itself is -- the settlement itself by its terms is ambiguous,
2 and so what you would want to look at is any extrinsic evidence
3 that might give an indication of what the parties intended, and
4 if, for example -- and I'm just going to name, you know, one
5 that I have no reason to believe exists, Your Honor, but it's
6 an example of why parties do discovery, because this is the
7 kind of thing that -- you know, that you're -- that you're
8 looking for.

9 If there was a clause in a prior draft that said all
10 non products coverage is being expressly preserved and it got
11 stricken, well, that would be bad for me, or alternatively, if
12 there was some -- you know, if there was some clause in a prior
13 draft that -- that got stricken which said that -- that
14 products coverage is being settled as well and then it got
15 dropped for the final agreement, that would be -- you know,
16 that would be a telling -- you know, that would be a telling
17 piece of evidence about what the parties intended.

18 So you always in these situations, Your Honor, where
19 you're looking for the intent of the draftsman in a situation
20 where the final product is ambiguous, it is always permissible
21 to inquire into the drafts and the other communications that
22 went back and forth in the negotiation process to find -- the
23 goal being to find what was the intention of the parties at the
24 time.

25 Now, the -- the -- Grace and Royal have pointed out

1 that there is a bunch of other evidence that they have tried to
2 -- that they've tried to introduce that would point to the
3 nonproducts coverage as having been settled. It is -- it is
4 intriguing that Grace's witness is primarily responsible --
5 that's Mr. Posner -- primarily responsible for insurance
6 matters agrees that -- that the nonproducts insurance as well
7 as products insurance was settled, but there is evidence that
8 points in a different direction, some of it emanating from
9 Mr. Posner himself. For example, the submission by Grace after
10 the 1995 settlement of some Libby claims to be -- to be covered
11 by the Royal Insurance policies, and also, Grace is listing --
12 which you may recall, Your Honor, because it took place right
13 here in the court -- in the drafts of the disclosure statement,
14 there was a schedule and the schedule listed what insurance was
15 settled, and the Royal Insurance was listed as being not
16 settled with respect to nonproducts coverage.

17 So somebody presumably had some basis for -- for
18 doing that, notwithstanding the fact that now that there is a
19 settlement with Royal, it's convenient to take the position
20 that -- that the nonproducts coverage had been settled all
21 along. So this is an important area of inquiry to determine
22 what it is that the estate is giving up in the context of this
23 settlement.

24 \$5.8 million is probably a fair price for the excess
25 -- to settle the excess coverage standing alone, Your Honor,

Argument - Cohn

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1 but you could be talking about potentially hundreds of millions
2 of dollars of coverage that's being -- that's being given up
3 for no consideration whatsoever, and that is a -- certainly an
4 important subject for inquiry in the context of the settlement.

5 The -- I'll get -- when we argue the motion itself, I
6 will, of course, address the alternative basis why the
7 settlement is objectionable and why we think the coverage is
8 still out there, but right now, I'm confining myself to issues
9 on which there is a need and a legitimate need for discovery.
10 So let me turn then to the second issue on which there remains
11 a need for discovery, and that is the issue of what exactly
12 were the negotiations amongst the parties to this settlement --
13 I'm not talking about the 2009 settlement -- as it relates to
14 this -- what we claim is unsettled nonproducts coverage.

15 It would appear from what we now know, Your Honor,
16 that the demand -- the negotiation with Royal started off with
17 a demand, that the demand was with reference solely to excess
18 policies, had absolutely nothing to do with there being any
19 unsettled nonproducts coverage. We believe, Your Honor, that
20 in the course of the negotiations, there was no mention of this
21 unsettled or allegedly unsettled nonproducts coverage, and
22 that's important to know, Your Honor, because, again, when you
23 look at the disparity between the values of the -- of the
24 coverages here, it would appear to us that the negotiating
25 record amongst the parties will establish that the estate is

Argument - Cohn

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1 receiving no consideration whatsoever for what is actually the
2 most valuable surrendering of -- of coverage that it -- that it
3 is making.

4 THE COURT: Okay. Well, I guess my confusion is that
5 the 1995 settlement for \$100.0 million, if it didn't include
6 the nonproducts coverage, settled a face amount that was due of
7 only 10.0 million. Why would someone pay \$100.0 million to
8 settle a \$10.0 million face?

9 MR. COHN: I believe, Your Honor, the coverage also
10 covered defense costs, and I believe that the defense costs may
11 have had no limit on them, which means that --

12 THE COURT: \$90.0 million to recover 10?

13 MR. COHN: Well, that --

14 THE COURT: That's a lot of defense costs, Mr. Cohn.

15 MR. COHN: Well, Your Honor, if that's -- then, you
16 know, that -- that obviously -- you know, areas -- that goes --
17 that goes to the very question of the -- of extrinsic evidence
18 of what the parties intended under that agreement. So if --
19 you know, if -- if what you would like to have is a full
20 presentation on that issue as well, in other words, why is it
21 -- why is it that parties would settle for \$100.0 million that
22 which has a face value of 10 unless they meant to include this
23 nonproducts coverage, Your Honor, we would be happy to -- to
24 provide that presentation, but, of course, we're going to need
25 appropriate discovery in order to do it.

Argument - Cohn

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1 We'll do that on an expedited basis. We're willing
2 to -- we're willing to take all reasonable steps to do this
3 quickly. We have -- we have already engaged in -- in the
4 discovery that -- that we've been able to on this issue -- I'm
5 sorry -- on -- concerning the Royal motion, and we'll continue
6 to work very quickly to get this done. It ought to be possible
7 with agreement and cooperation among the parties to get this
8 done in time for --

9 THE COURT: Well, isn't --

10 MR. COHN: -- the August hearing.

11 THE COURT: Isn't the real issue what the extent of
12 the 1995 settlement was, and to the extent that was the debtors
13 are doing is settling two excess policies and nothing more,
14 then the order should make it clear or the settlement should
15 make it clear that what they're settling is the excess policies
16 and nothing more. The 1995 settlement is what it is, and if it
17 included the nonproducts, it did, and if it didn't include
18 nonproducts, it didn't, but why does this settlement have to
19 address that issue if what it's doing is settling the excess?

20 MR. COHN: That -- Your Honor, that's an excellent
21 point. That really goes to our argument -- to the argument --
22 one of the arguments that we make against the settlement, but
23 that's right. Why -- why -- if all you're -- if the price is
24 being calibrated and if all you're -- if all the benefit to the
25 estate is getting is the \$5.8 million, that's a good forecast

Argument - Cohn

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1 of what would be paid anyway under the excess policies, that's
2 right. Why -- why give up this potentially, you know, tens or
3 hundreds of millions of dollars of other coverage?

4 And that -- but that, as I say, goes to the -- that,
5 as I say, is an argument that we'll -- that we'll make on the
6 merits of the Royal settlement. I'm trying to -- I'm trying
7 to --

8 THE COURT: But if, in fact, the -- there is an
9 agreement that the settlement only covers the excess, then no
10 discovery is necessary, because I think you're in agreement
11 that the 5.8 million is a fair price for a settlement of those
12 excess policies.

13 MR. COHN: No, Your Honor. What -- what Royal gets
14 is a -- is a release that covers the unsettled nonproducts --

15 THE COURT: Right. What I said is --

16 MR. COHN: -- coverage if it exists.

17 THE COURT: I think what I said is if that release is
18 not in there and -- as to the 1995 settlement, whatever that
19 is --

20 MR. COHN: Right.

21 THE COURT: -- and the only thing that's being
22 settled is the excess policy coverage, then you don't have any
23 problem with a release on the excess policies in exchange for
24 5.8 million.

25 MR. COHN: I would be delighted with that,

Argument - Cohn/Bernick

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1 Your Honor, but that's --

2 THE COURT: Then let me hear why we're doing
3 something more than that first.

4 MR. COHN: Thank you, Your Honor.

5 THE COURT: Because I -- frankly, I don't understand
6 why we're doing more than that either.

7 MR. BERNICK: This is relatively simple, Your Honor,
8 and I'm happy to go through this in more detail, but
9 Mr. Schiavoni is back there and knows this in much more detail
10 than I do, but from the debtor's point of view, the story is a
11 very, very simple story. Our people have been deposed on this
12 already. The record is there. That's why --

13 THE COURT: But they either got releases already on
14 those settlements or they don't.

15 MR. BERNICK: Yeah. Well --

16 THE COURT: There is no need to incorporate that
17 release here in exchange for what may appear to be no -- no
18 additional consideration. So why? So why are we complicating
19 this record?

20 MR. BERNICK: That's all Mr. -- that's all Mr. Cohn's
21 gloss.

22 THE COURT: Well, it's mine too.

23 MR. BERNICK: Well, but it's their -- there is no
24 facts. He just said it. He just said it, and facts are these.
25 The '95 policy was settled. It included everything, and we can

Argument - Bernick

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1 go through the --

2 THE COURT: Then you don't need another release.

3 MR. BERNICK: What?

4 THE COURT: Then you don't need another release.

5 MR. BERNICK: No, but what --

6 THE COURT: If the 1995 settlement included
7 everything on the primaries, then it is what it is.

8 MR. BERNICK: It is what it is, but we all know that
9 in the context of litigation over coverage, particularly in a
10 mass tort context, there is always some element of uncertainty.

11 THE COURT: Yeah. That's the way it is.

12 MR. BERNICK: And -- well, there is an element of
13 uncertainty, and an insurer, any company, any company in the
14 context of settlement has the opportunity to ask for a release
15 and ask for a release that is designed to reduce uncertainty.
16 That is part of the bargaining process.

17 So no. We're not going to make the representation
18 that the only thing that was settled was the excess policies.
19 The excess policies were the principle value that was left was
20 the possibility of getting coverage on the excess policies.

21 THE COURT: Then I need something, some evidence
22 that's going to show me that this is a fair settlement, because
23 to the extent that the 1995 settlement provided a settlement
24 for all primary policies, it did, and Royal already has a
25 release to that extent. To the extent that there are now two

Argument - Bernick

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1 more policies that you're trying to settle, frankly, I don't
2 see a basis --

3 MR. BERNICK: Well --

4 THE COURT: -- for backing up without some additional
5 consideration, and then I need to know how is the consideration
6 being addressed so that I can determine that, in fact, the
7 settlement is in the best interest of the estate.

8 MR. BERNICK: Okay. Let me just back up for a
9 second. First of all, with respect to Mr. Cohn -- respect to
10 Mr. Cohn, Mr. Cohn by his own admission is focused on the
11 nonproducts coverage --

12 THE COURT: Yes.

13 MR. BERNICK: -- because his clients have nonproducts
14 claims. With respect to what the settlement agreement says,
15 the settlement agreement could not be clearer, and Your Honor
16 already has --

17 THE COURT: Which settlement?

18 MR. BERNICK: This is the 1995 settlement agreement.

19 THE COURT: All right.

20 MR. BERNICK: And the recitals pick out and talk
21 about asbestos related claims. Here is the definition.

22 "Damages for injury or damage to buildings and
23 property allegedly caused by asbestos [not just
24 asbestos products] asbestos or asbestos containing
25 materials, all such injury claims and related

Argument - Bernick

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1 lawsuits as asbestos related claims."

2 And then bodily injury --

3 "Bodily injury, sickness, disease and/or death as a
4 result of an exposure to asbestos or asbestos
5 containing materials."

6 It's not just products. It's anything, and that
7 obviously would pick up the -- the claims for -- for exposures
8 that are not based upon a product.

9 The specific release by Grace says -- it's a release,
10 blah, blah, blah, blah --

11 "...for any claims, liabilities...which Grace has or
12 may have against Royal in any way related to the
13 New York primary action and/or payment or handling of
14 asbestos related claims and other product claims
15 under the primary policies."

16 It's as broad as broad can be.

17 THE COURT: All right. So then you don't need the
18 additional release in this one.

19 MR. BERNICK: Well --

20 THE COURT: You're shooting yourself in the foot,
21 Mr. Bernick.

22 MR. BERNICK: Mr. Cohn first -- Mr. Cohn first, and
23 then we'll -- we'll deal with this issue, but let's get --
24 let's get the basic -- entire agreement. Couldn't be clearer.
25 There is a merging clause here. This closes it out. This is

Argument - Bernick

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1 the deal. There is not a single piece of testimony that says
2 that this was not the deal.

3 He says there is ambiguity. There is no ambiguity.
4 The parole evidence rule does not apply. Nonproducts coverage
5 is gone as of 1995. Full stop.

6 Mr. -- Mr. Cohn's interest in this whole matter
7 vis-a-vis his clients is gone full stop. There is no incipient
8 interest that he can have through his current clients in
9 property that no longer is there because it's been resolved.

10 So Mr. Cohn waltzes away, and Your Honor now has a
11 remaining concern with the fairness of the settlement that now
12 is before the Court.

13 Now, before the Court today, we have a settlement.
14 The settlement takes out the litigation risk that Arrowood
15 faced with respect to its excess policies. At that time, there
16 is then a question of well, what else is there that might be
17 residual for any reason. Not just nonproducts. It could be
18 anything, and certainly, any client has the opportunity to ask
19 for a broad release. Maybe belt and suspenders is a broad
20 release.

21 The remain -- and there can't be a question but that
22 as a matter of contract and settlement, this happens every day
23 of the week. The boilerplate language on the broad nature of a
24 release is something that is used -- you know, it's always
25 used. It's not confined. It's not confined to some narrow

Argument - Bernick

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1 construction of the subject matter. It is designed to be broad
2 in order to cover the unforeseeable, to recover -- to cover
3 arguments that might be made, whether they're nonproducts or
4 not.

5 THE COURT: In a coverage court, not here.

6 MR. BERNICK: No. Well, I don't -- I think,
7 Your Honor, really, the only remaining question is the adequacy
8 of the consideration that is paid.

9 THE COURT: Uh-huh.

10 MR. BERNICK: So you say \$5.8 million. Mr. Cohn
11 doesn't know and there is no record before the Court that said
12 that well, \$5.8 million was negotiated in resolution purely,
13 narrowly, and simply of the risk to the excess policies.

14 THE COURT: Which is what I just said. I need some
15 evidence --

16 MR. BERNICK: Well --

17 THE COURT: -- that shows me --

18 MR. BERNICK: -- but --

19 THE COURT: -- that it's reasonable.

20 MR. BERNICK: To the -- no. The question is whether
21 the release that was obtained is reasonably -- reasonably
22 supports the -- or it's reasonably supported by the
23 consideration.

24 There is no -- there is no magical number that says
25 the excess policies alone were worth \$5.8 million. The deal

Argument - Bernick

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1 that got struck was a deal that says in exchange for the full
2 package, which is Arrowood walks away and walks away forever,
3 the price is \$5.8 million, and there is a record that says that
4 it's reasonable, and the record is robust and the record
5 doesn't require the allocation of -- well, this amount for the
6 excess policies, this amount for residual risk, this amount for
7 whatever, this amount for the costs -- the costs of litigating
8 the matter --

9 THE COURT: That's right.

10 MR. BERNICK: -- which are also considerable, this
11 amount for getting peace with Mr. Schiavoni. I mean, you know,
12 look, there are real, real issues here.

13 Okay. So we get -- we get peace. Grace gets peace.
14 Grace gets the value that is -- is on the table, and there are
15 a whole series of considerations. Your Honor, the record is
16 plain. It's in there in black and white in the declarations
17 that have been provided that say here are all the different
18 things that the estates and the creditors get for this, and
19 it's not just the litigation prospect against the excess
20 policies. You can't -- you can't parse or quantify monetarily
21 all of these different intangibles. They are there. They are
22 the price. They are part of peace from Arrowood, and the price
23 is \$5.8 million, and the record, Your Honor, could not be more
24 robust. Where does it come from? It comes from Mr. Horkovich,
25 from Anderson, Kill. It comes from Caplin and Drysdale that's

Argument - Bernick

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1 done this about a gagillion different times, and it comes from
2 Mr. Schiavoni who's done this a lot. You couldn't have more
3 capable people negotiating this package.

4 Mr. Cohn now comes in, and he says well, I can't take
5 issue with Mr. Schiavoni. I can't take issue with Caplin and
6 Drysdale. I can't take issue with Horkovich. I tried to take
7 issue with the 1995 settlement. That goes nowhere, but he says
8 now I want a little ledger where you have the excess policies
9 were for 5.732, intangible one was \$28,000 and intangible two,
10 \$29,000. It doesn't work that way. We're not required to do
11 it. The process doesn't work. You don't do deals on that
12 basis. You do deals as packages.

13 So he is imposing -- he is importing, and I think
14 he's gotten a little traction with Your Honor, maybe a lot of
15 traction with Your Honor, that somehow, in accounting for the
16 reasonableness of a settlement, you have to force into the mold
17 of dollars and cents each element of --

18 THE COURT: Oh, no.

19 MR. BERNICK: -- of value.

20 THE COURT: No. I don't think I ever have said
21 something. I said that I want some evidence as to why this
22 settlement is in the best interest of the estate when it
23 appears to incorporate a release that the debtor has already
24 given from the perspective of the plan proponents for something
25 that the debtor already was paid for.

Argument - Bernick

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1 MR. BERNICK: No. No. The release --

2 THE COURT: So where is there --

3 MR. BERNICK: The release --

4 THE COURT: -- additional consideration?

5 MR. BERNICK: The release is there.

6 THE COURT: Mr. Bernick.

7 MR. BERNICK: I'm sorry.

8 THE COURT: Where is there additional consideration
9 even necessary when the debtor has already given a release,
10 which is what the debtor is telling me. The 1995 settlement
11 incorporated a release.

12 MR. BERNICK: Okay.

13 THE COURT: And the debtor got \$100.0 million as --
14 in the exchange for that settlement.

15 MR. BERNICK: Assume that there is no value in the
16 5.8 for that. Assume that it's gone, it's history, that it's
17 already happened. The five point --

18 THE COURT: Then the question I need is --

19 MR. BERNICK: Yes.

20 THE COURT: -- why is it necessary, because this
21 additional litigation risk I can't see. If that policy is as
22 clear as everybody thinks it is --

23 MR. BERNICK: There is nothing --

24 THE COURT: -- then there is no additional litigation
25 risk.

Argument - Bernick

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1 MR. BERNICK: The nature of the release is not in
2 some fashion -- I'll be corrected if I'm wrong on this. Okay.
3 I'm wrong on it already. I'm going to defer -- but the point
4 of the matter is that all of these different things are
5 intangibles, and nobody is saying to the Court that there is X
6 additional money that got paid to make sure that there was a
7 belt and suspenders on the old 1995 release.

8 What they're saying is it's \$5.8 million. That was
9 the bottom line number. There is no separate ledger in the
10 settlement that says X's for this, Y's for this, Z's for this.
11 There is a -- there is a -- there is a -- an overall package
12 that gives final peace to Royal/Arrowood. It costs
13 \$5.8 million, and the reasonableness of it is established from
14 the process that was gone through to reach it.

15 Now, does it include this? It includes it. It
16 includes potentially kinds of other risks, all kinds of other
17 benefits. There is no reason to exclude it. Why would you
18 exclude it?

19 THE COURT: If it's going to buy peace with the Libby
20 claimants because you don't need it, why would you include
21 it --

22 MR. BERNICK: It's not -- it's not --

23 THE COURT: -- when you already have it?

24 MR. BERNICK: Well, because God knows, the world is
25 always uncertain. I don't think it defeats the reasonableness

Argument - Bernick

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1 of the settlement. Why -- I mean, I don't even understand.

2 Let's assume -- let's assume that -- let's assume that --

3 THE COURT: How can you settle something you've
4 already settled? I guess that's the bottom line.

5 MR. BERNICK: Well, it's not --

6 THE COURT: You're telling me you've already settled
7 this issue, and now as -- as a part of another settlement which
8 is drawing objections, you're resettling --

9 MR. BERNICK: They get --

10 THE COURT: -- the same issue.

11 MR. BERNICK: They get 520 -- they get the best
12 protection in the world. They get 524(g) in insurance junction
13 protection out of a Bankruptcy Court that wraps this thing up.
14 I've got to tell you, I'm not -- I don't represent Arrowood.
15 I've never -- I don't think I've ever --

16 THE COURT: But they'd get that --

17 MR. BERNICK: -- represented an insurance company.

18 THE COURT: -- based on the 1995 settlement.

19 MR. BERNICK: What?

20 THE COURT: They'd get that on the primary policies
21 based on the 1995 settlement. That's the debtor's position.

22 MR. BERNICK: I'm sorry, Your Honor. I've
23 represented a lot of different companies that faces asbestos
24 liability situations, and wrapping this into a 524 injunction
25 and plan is as good as gold, and it's better than that. It's

Argument - Bernick

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1 better, because it's subject to enforcement by a court that has
2 sole and exclusive jurisdiction for now and forever. You're no
3 longer -- if somebody comes back in -- you know, in State Court
4 with some kind of direction action statute and files a lawsuit
5 against Arrowood, it's -- it's oh, let me argue now whether, as
6 Mr. Cohn says, whether this is ambiguous or not, whether we're
7 going to have parole evidence or not.

8 No. You -- we don't have to make the argument. They
9 don't have to make the argument in State Court. It's -- it's
10 go directly to go. There is a 524 -- there is an injunction
11 coming out of a Federal Court that says you shouldn't be here
12 with your direction action claim, period.

13 Boy, if I were representing a company that had that
14 situation, and I do, not an insurance company, I want the
15 524(g). I'd pay for the 524(g). God knows, we are paying for
16 the 524(g) so that we don't have to face State Court litigation
17 all over the place.

18 I mean, Your Honor heard for the chorus over here,
19 and now we'll hear it again. They say well, you know, what
20 might happen in some Godforsaken part of a State Court in the
21 United States of America. Well, Mr. Schiavoni is of like mind.
22 His client also is an insurance company, and they're concerned
23 about exactly the same kind of risk. So they say I like
24 524(g), I want -- I want the full protection that is available
25 under the law in this court and there is added value to it.

Argument - Bernick/Schiavoni

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1 What was that value? I have no idea. I don't think anybody
2 quantified it, but it is part of the package that was
3 purchased.

4 So the Mr. -- the Mr. Cohn argument that says oh,
5 it's ambiguous and oh, this or that, I can see him making that
6 argument in Libby. He will make the argument in Libby. That's
7 why he's standing up and talking, because he'd rather say well,
8 we're here in Montana now on some kind of claim outside of the
9 bankruptcy and well, gee, you know, that 1995 thing is
10 ambiguous, let's go relitigate it in Libby, Montana.

11 THE COURT: Okay. Let me hear from Mr. Schiavoni
12 about one thing. I don't know the effect on the settlement of
13 the fact that the company -- the insurance company is in
14 runoff. So if you could explain to me how that factors into
15 this settlement proposal, I would appreciate it.

16 MR. SCHIAVONI: Your Honor, it goes directly to one
17 of the Martin factors, which is the collectability, the risk of
18 collectability. We put in an affidavit and we also have here an
19 executive from Arrowood who, if called to testify, is prepared
20 to confirm that Arrowood is in runoff. It ceased writing
21 insurance policies some time ago. Its ratings in -- in Moody's
22 and S&P and what not were withdrawn.

23 This is an issue that goes to fundamentally would
24 this -- you know, would this coverage be collectible out in the
25 future. It enhances the value of any current settlement,

Argument - Schiavoni

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1 because if Arrowood isn't there five or six years from now, a
2 current settlement now that puts money in the trust that
3 resolves other Arrowood issues is of more value now.

4 And, Your Honor, I hope that answers your question,
5 but just to pick up on -- on a point that Mr. Bernick -

6 THE COURT: Well, I don't know the timing issues, I
7 think Mr. Schiavoni. I simply don't know. I understand the
8 concept of runoff, but over what period of time is some runoff
9 likely to take place?

10 MR. SCHIAVONI: Let me explain what I think it means
11 in this context. Arrowood ceased doing active business,
12 writing -- bringing in new revenues some time ago, a fair
13 amount of time ago it really wrapped up its operations. The
14 runoff they hope to complete as soon as possible. They are
15 faced with claims on a current basis, but to the extent they
16 have long tail claims, yes. They'll be faced with claims going
17 out, you know, for some period of time, but they're looking to
18 wrap up the runoff as -- as quickly as humanly possible.

19 THE COURT: All right.

20 MR. SCHIAVONI: There is no -- there is no set date.
21 They're -- they're operating under the -- the direct guidance
22 of the Delaware Insurance Department. They're subject to very
23 -- you know, to periodic quarterly reviews of where they are.
24 They are directed to try to resolve claims as -- as quickly as
25 they possible, as they have now.

Argument - Schiavoni

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1 The real point though is that this is not Zurich.
2 This is not Travelers. We are not backed by billions of
3 dollars of new ongoing revenues coming in. This is a very,
4 very defined entity.

5 It -- to some extent, you may have heard some
6 arguments like this in connection with Equitoss (phonetic), the
7 London market carriers, but this is a -- compared to Equitoss,
8 this is almost like a fly on the back of an elephant. It's a
9 very, very, very small company with very, very limited assets
10 which, in fact, Judge when they made the 1995 settlement, it
11 was an attempt to resolve at that point, because they were out
12 of -- they were effectively out of business, it was an attempt
13 looking forward to resolve the entire package of all asbestos
14 liabilities in a fair way.

15 That's what they tried to do then. They thought they
16 were completely done at that point. It is absolutely essential
17 from Arrowood's point of view that we leave with any settlement
18 with the debtors with finality, not just because that's what
19 just -- people always want, but it's because especially given
20 the position that we're in and the fact that we've got to
21 report back to the Delaware Insurance Department about where we
22 are, that we need to sort of check these off that this one is
23 done and we can move on. There is no residual risk.

24 On this issue of consideration, I don't think you've
25 got the full picture if you're focused on the \$5.8 million as

Argument - Schiavoni

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1 -- as the driving consideration here. This is a package, as --
2 as everyone has referred to, but the rest of the package there
3 is tremendous value in.

4 We have a proof of claim outstanding against the --
5 the debtor. We also have under the terms of the 1995
6 settlement indemnification for that \$100.0 million. We also
7 have a whole series of contractual rights that go to issues
8 about no claims being tendered to us in the future.

9 Many of the types of issues that are in that contract
10 drive objections that we had otherwise advanced to the plan
11 and, in fact, drive objections that other settled -- previously
12 settled insurers had. We are settling as part of this
13 settlement the entire package of our objections against the
14 plan, that -- we -- we are normalizing those as part of this.
15 That is of real value, and other courts have found that is of
16 real value.

17 Equally, if not more important, we are compromising
18 the proof of claim. When the -- you know, Mr. Cohn sort of is
19 of the view that well, you make \$100.0 million payment under a
20 settlement, and then he can sort of come by and shake us down
21 on some sort of threat that maybe this deal isn't good enough
22 and, you know, we're just dumb enough to sort of pay twice.

23 When the deal was done in the first place, the
24 parties did what good lawyers do. They put in the deal.
25 They're like we're giving you \$100.0 million, but should any

Argument - Schiavoni

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1 more claims get tendered to us or people come back to us,
2 basically, we have claims back against the estate on that. We
3 are normalizing, resolving all of those. There is huge value
4 there.

5 I don't -- I would tell you with respect to the
6 monetary consideration that from Arrowood's standpoint, these
7 excess policies -- we joked during -- during the settlement
8 negotiations that they're so high and so late, that even on a
9 sunny day in San Francisco, you can't see those policies.
10 Okay?

11 We don't think -- this is Arrowood. I will tell you
12 that the debtors and the claimant's lawyers are viewed
13 aggressively, that they should get as big a dollar number as
14 possible, but from Arrowood's perspective, no money was owed on
15 those excess policies or would be owes for decades because they
16 were so high. \$7.5 million of the -- of the excess that was at
17 risk, that was 75 percent of it, was excess of \$150.0 million.
18 That would have meant that if you spread the claims over 20 or
19 30 years, they would have had to have burned through like
20 \$4.0 billion before they'd touch that money. I'm not aware of
21 any trusts that as of this date have actually spent that --
22 anywhere near that realm of money.

23 So the dollars we think were not necessary here for
24 any other reason to just -- other than to drive a package
25 settlement. The -- the deliver of the proof of claim release,

Argument - Schiavoni

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1 the -- the -- the resolution of the contractual claims are all
2 of huge, huge value.

3 Now, on this issue, Judge, about what discovery was
4 provided and what record the -- that there is to support the
5 fairness of the overall settlement, and I would say not -- if
6 you want to include in that package was the '95 settlement
7 fair, well, is there proof of that in the record, and the
8 answer is absolutely yes, there is.

9 We put in a declaration from myself, Your Honor.
10 It's quite detailed. I'm prepared to -- if called to testify,
11 to verify that the -- all the facts in that declaration are
12 accurate. We have our entire negotiating team here. Mr.
13 Pernicone is prepared to take the stand and testify --

14 THE COURT: Well, as to the 1995 settlement, there is
15 no issue about the fairness. That's been approved. That's a
16 done deal. I don't see any issue about fairness in that
17 capacity, and I'm aware of the -- of the declarations, and I
18 have read them all. So I don't think the issue with respect to
19 the negotiations and so forth that led to the 5.8 million is
20 the issue.

21 The issue is whether or not a release that actually
22 goes back to the 1995 nonproducts coverage should be
23 incorporated in this agreement, and I was forgetting, frankly,
24 the fact that there are the other additional aspects of
25 consideration that are valuable to the debtor in addition to

Argument - Schiavoni

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1 the funding, and I appreciate the contingency nature of the
2 funding as -- as well, the 5.8 million as well in terms of how
3 late an excess policy this is.

4 So I can stop you on the negotiation side.

5 MR. SCHIAVONI: Well, Judge, let me just -- just tell
6 you one other thing that's in the record as far as -- that
7 hasn't been talked about. On the '95 settlement, three
8 witnesses were produced by the debtor already, Mr. Posner,
9 Mr. Hughes, and Mr. Finke. They were all questioned about that
10 settlement, how it worked, what the coverage was under it, how
11 it was negotiated, was it at arms length, et cetera, and --

12 THE COURT: You mean produced for discovery in this
13 case.

14 MR. SCHIAVONI: Yes. Absolutely.

15 THE COURT: Now. Okay.

16 MR. SCHIAVONI: Because it is one of their
17 confirmation objections, I guess, that somehow, that settlement
18 wasn't fair. They sort of -- I don't -- and frankly, I don't
19 understand the objection, but it was raised in connection with
20 their -- their papers.

21 So they had an opportunity to take that discovery
22 during plan confirmation, and, in fact, they did, and, in fact,
23 a very detailed record was elicited in connection with those
24 depositions. Arrowood -- and that record is totally and
25 completely in support of -- of three things, one, that the 1995

Argument - Schiavoni

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1 settlement was a full and complete settlement of all asbestos
2 claims; two, that the settlement was negotiated at arms length
3 and in good faith; and three, that that was a reasonable
4 settlement at the time by the parties given all the
5 circumstances that took place.

6 You can -- Arrowood designated that testimony from
7 Mr. Posner and from Mr. Hughes and to the extent there is a
8 short reference to Mr. Finke in connection with the phase one
9 confirmation hearing. That -- I consider that effectively in
10 the record. It's cited in support of the debtor's motion, and
11 it's cited in our -- in our reply papers. It is part of this
12 record in support of the overall fairness of the overall
13 settlement here, that the -- the original consideration that
14 was paid was fair, that this now is wrapping this all up and
15 tying it down and resolving it all as part of one single deal.

16 And, Judge, I would like to add one other thing. We
17 went a step further than. All right? When Mr. Cohn for the
18 first time raised this notion that well, he didn't think he had
19 enough discovery about whether or not the last settlement was a
20 full settlement, we said well, hell, we'll go out and we'll
21 bring -- we'll give you the person who signed the settlement
22 for us, we'll offer him for deposition, and I even went so far
23 to say you have questions about the current settlement and how
24 the two deal with each other, I'll offer myself. I was a chief
25 negotiator.

Argument - Schiavoni

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1 And, Judge, we offered it. He -- Mr. Cohn declined
2 to come to the deposition. I then went so far as actually to
3 notice my own deposition and to notice Mr. Ken Hooper's
4 deposition. I was able to sell a few tickets to my deposition,
5 but one I was not able to sell was to Mr. Cohn. He refused to
6 come not just to my deposition, but he refused to come to the
7 deposition of Ken Hooper who signed the '95 settlement.

8 Mr. Posner signed the '95 settlement for Grace. He
9 had a full, total, complete opportunity to ask him any
10 questions he wanted about the fairness of that settlement, the
11 finality of it and everything else. The record that came out
12 is the record that he stuck with.

13 The one beef he seems to have now is that he doesn't
14 have drafts of the '95 settlement, but, Judge, we've given him
15 the final settlement. It has an integration clause in it, and
16 in addition to that, Judge, the parties here, we have testimony
17 from the fellow who signed it, Mr. Posner, for Grace. He
18 testified that that settlement was full and final and complete
19 and covered all asbestos related claims.

20 We have the offer of the testimony from Ken Hooper,
21 the Arrowood person who signed it for us who says the exact
22 same thing. We also produced -- and I won't give you the cites
23 unless you want them, but they're in -- they're in the briefs.
24 We produced contemporaneous letters that these two gentlemen
25 exchanged between each other at the time of the settlement that

Argument - Schiavoni

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1 say that it was a complete settlement and it covered all
2 asbestos related claims. We also have --

3 THE COURT: So your position is that even -- even if
4 the drafts exist and even if they said something to the
5 contrary, the testimony of the witnesses is that their intent
6 was to settle everything. So to the extent that it was somehow
7 left out of the 1995 settlement, that would have been a mutual
8 mistake.

9 MR. SCHIAVONI: I would go a step further, Judge. I
10 would say that the law in this circuit -- and I'm going to
11 quickly try to find the case -- is that when two parties to a
12 contract agree -- are in accord as to its meaning, that
13 evidence -- extrinsic evidence in that circumstances is not
14 permitted --

15 THE COURT: Yeah. That is --

16 MR. SCHIAVONI: -- as a matter of law.

17 THE COURT: I think that is the law in the circuit,
18 but none -- whether it is or not, I'm having a little bit of
19 difficulty understanding where the 1995 settlement is ambiguous
20 anyway. That's one reason. I don't know why the additional
21 release is needed, because I don't think it's ambiguous. But
22 okay. I understand.

23 MR. SCHIAVONI: Well, I'm not going to be arguing
24 with a judge. God, if I said anything to suggest it was
25 ambiguous, I mean, that's --

Argument - Schiavoni/Guy

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1 THE COURT: All right.

2 MR. SCHIAVONI: -- not where I'm going either.

3 THE COURT: Let me hear from Mr. Cohn. I understand
4 your arguments. I think I need to see whether or not there is
5 -- oh, Mr. Guy, I need to find out whether there is some need
6 for discovery. I'm not necessarily convinced there is.

7 MR. SCHIAVONI: Your Honor, there is just one last
8 point. There is also -- I mean, this Court has issued ruling
9 -- many, many rulings about drafts not being discoverable, and
10 there is all sorts of good policy reasons --

11 THE COURT: Well --

12 MR. SCHIAVONI: -- behind that.

13 THE COURT: -- plan drafts. You know, I keep --
14 everything keeps expanding. I've been talking about plan
15 drafts, but regardless of that fact, to the extent that
16 producing drafts would, in fact, show something to the contrary
17 here, assuming they exist, I think you're correct. The
18 witnesses have pointed out that their intent was to settle all
19 coverage and that they interpret this policy as having done
20 that, and the parties to the document are uniform in that. I
21 don't have a dispute between the parties regarding the intent
22 of the 1995 settlement.

23 MR. SCHIAVONI: Thank you, Your Honor.

24 THE COURT: Mr. Guy?

25 MR. GUY: Thank you, Your Honor. I think Your Honor

Argument - Guy

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1 is already there on the drafts as to the 90/95 settlement. If
2 we thought it was unclear, we would have made --

3 THE COURT: I can't hear you, Mr. Guy. I'm sorry.

4 MR. GUY: I'm sorry, Your Honor.

5 THE COURT: Yeah. I apologize, but that microphone
6 is just not working well.

7 MR. GUY: Your Honor, on the drafts of the 90/95
8 settlement, you're already there on that I can see. The
9 document is clear. If we thought it was unclear, we would have
10 negotiated differently. We didn't think it was unclear.

11 On the negotiations for this settlement that is
12 before you today, Mr. Schiavoni made himself available, and
13 Mr. Cohn didn't ask him any questions, didn't even take his
14 deposition. So he's had that opportunity. We don't think it's
15 appropriate to get into the negotiations between the parties
16 for settlements that are coming before you today.

17 I recognize it's not the plan, but we're trying to
18 negotiate with multiple parties right now in advance of
19 confirmation so we can streamline the confirmation and get this
20 debtor out of bankruptcy. It can't be the case that a party
21 who comes in and says well, I want to imagine the settlement in
22 '95 said something different and therefore, I want discovery of
23 what you agreed to, what the parties agreed to in the context
24 of a settlement agreement that's before you today that is plain
25 on its face. Both of them -- no one is arguing the settlement

Argument - Guy/Laughlin

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1 that's before you today is ambiguous.

2 Your Honor, on the consideration which is your
3 crucial question, and I think this is going to neutralize the
4 need to get to the merits of the motion, and we'll go back to
5 it if you need more, but Royal is giving up its rights, its
6 indemnification rights under the 90/95 settlement. That is
7 huge, absolutely huge. There is plenty of consideration for
8 what you have before you without even getting into the other
9 issues that Mr. Schiavoni raised.

10 THE COURT: I think that adds a -- quite a bit of
11 value over and above \$5.8 million.

12 MR. GUY: Thank you, Your Honor.

13 THE COURT: Mr. -- Mr. Laughlin.

14 MR. LAUGHLIN: I have one point to make, Your Honor.
15 You've been pointed out to all of the evidence, including
16 nobody bothered to mention that I got deposed on this
17 settlement. That's a first. That's been educed in favor of
18 the favor of the fairness of the settlement.

19 Mr. Cohn has done one thing that at least initially
20 seemed to be getting traction with Your Honor, which is he's
21 come in here and said well, I think that \$5.8 million is fair
22 amount for the excess policies, but, you know, how much are you
23 getting for the release, et cetera. There has been a lot of
24 discussion that you listened to about it's a package deal, and
25 certainly, Mr. Schiavoni has made it quite clear that whether

Argument - Laughlin

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1 you want to call it belt and suspenders or otherwise, he was
2 adamant that he get a court approved blessing of the scope of
3 the release.

4 Remember, the 1995 agreement is just an agreement
5 between two parties. This is -- this is an additional step, as
6 Mr. Bernick pointed out, but there is one thing that's
7 absolutely lacking here with respect to Mr. Cohn, which is the
8 stuff about \$5.8 million a good deal for the excess only.
9 That's just lawyer talk. He has not put on a declaration --

10 (Microphone feedback)

11 THE COURT: I'm sorry.

12 MR. LAUGHLIN: He has not tendered a witness, a
13 declaration --

14 (Microphone feedback)

15 THE COURT: Pardon me. Whoever is on the phone who I
16 don't know what you're doing, but it's causing a lot of
17 feedback. If the Court Call operator is on, can you please
18 mute those lines?

19 OPERATOR: Yes, I will, Your Honor.

20 THE COURT: Thank you. I'm sorry, Mr. Laughlin.

21 MR. LAUGHLIN: As an objector, if he's going to come
22 in here and assert that he's valued this package in some way
23 differently from what the plan proponents valued it, which is
24 5.8 million for a package of give-ups on both sides, he's got
25 some obligation to tender that. He hasn't.

Argument - Laughlin/Casey

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1 So all we have now is alleged opinion, alleged facts
2 from somebody who's put it in a brief and making oral argument
3 on it, and that's simply not enough under any rule of evidence
4 that I'm aware of to create an issue -- a triable issue of fact
5 or an issue of disputed fact.

6 I mean, he -- he -- they had ample opportunity to
7 produce a witness if they were going to do so, whether it be an
8 expert or a fact witness or what have you, and they totally
9 failed to do so.

10 MR. CARIGNAN: Again, for the record, James Carignan
11 of Pepper, Hamilton for BSNF Railway. I'd like to respectfully
12 move the admission of my colleague, Linda Casey, pro hac vice.
13 Papers haven't been filed yet, but they are prepared and we'll
14 file them this afternoon.

15 THE COURT: All right. Ms. Casey, where are you
16 admitted?

17 MS. CASEY: I'm admitted in the states of
18 Pennsylvania, New York, and New Jersey.

19 THE COURT: And are you in good standing?

20 MS. CASEY: Yes, I am.

21 THE COURT: All right. You're admitted for today.
22 Thank you.

23 MS. CASEY: Thank you. Your Honor, as you pointed
24 out, the settlement agreement does not just settle the
25 quote/unquote newly discovered excess policies, the high level

Argument- Casey

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1 policies. The settlement agreement, which is 36 pages long,
2 goes through in great detail to insure that the 1995 settlement
3 release, as purported by the parties, is judicially approved as
4 in the best interest of the estate.

5 BNSF has throughout the confirmation process all the
6 way back in December asserted that it has rights in these
7 policies, that, in fact, there are endorsements that
8 specifically relate to the debtor's obligations to indemnify
9 BNSF.

10 THE COURT: Well, what the endorsements do is say
11 that the insurance company will pick up the debtor's indemnity.
12 It doesn't give BNSF any rights under the policies. It simply
13 determines who's going to pay the indemnity obligation.

14 MS. CASEY: Well, there is two issues on that.
15 First, there are -- there is case law that says that when there
16 is this type of endorsement that specifically protects BNSF, it
17 becomes an additional insured, and secondly and more
18 importantly is the indemnifications provided a -- the debtors
19 paid separate policy premiums and obtain separate policy
20 limits, and one of the issues --

21 THE COURT: There is not a limit. It's an agreement
22 to indemnify to the extent the debtor is obligated to
23 indemnify. I didn't -- at least I didn't see a limit. I'm
24 sorry.

25 MS. CASEY: Your Honor, if I may, the debtors filed a

Argument- Casey

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1 reply to our objection and included the endorsement from it.
2 It does have a confidential designation on it. However, it has
3 been filed on the record by the debtors.

4 THE COURT: Okay.

5 MS. CASEY: So I'd like to --

6 THE COURT: All right. If I may, I haven't seen it.
7 I'm sorry. If that's the case, I have not seen a limit. I
8 have seen an indemnity language.

9 (Pause)

10 MS. CASEY: You'll see at the --

11 THE COURT: Yeah. What I have seen is the language,
12 but not the part that's below.

13 MS. CASEY: Right. And about three-quarters of the
14 way down, it has bodily injury liability, \$200,000 each person,
15 \$500,000 each accident.

16 THE COURT: Okay.

17 MS. CASEY: There is no aggregate listed for this --
18 this liability that is specifically relating to the BNSF
19 indemnification obligation. I am assuming that we are going to
20 the merits of the motion, not just whether the case should be
21 -- gone forward. However, there is no evidence in the record
22 concerning this specific protection. BNSF has asserted
23 throughout as, again, from December through today that Royal --
24 Royal Indemnity Company is not entitled to the 524(g)
25 injunction as it relates to the claims against these policies

1 relating to BNSF's indemnification claims, because the
2 settlement agreement could not as a matter of law release
3 BNSF's rights under these policies to the extent we have those
4 state law rights. To the extent we don't have those state law
5 rights, there is no evidence to suggest that the settlement
6 agreement in 1995 included a provision to pay for the amounts
7 that the debtors are entitled under this policy.

8 In addition, the plan does not have a specific fund.
9 This -- this is not shared proceeds. Other asbestos creditors
10 are not entitled to these proceeds under these separate limits.
11 The plan doesn't have a specific contribution designated for
12 BNSF for its rights to assert claims against the estate that is
13 protected by insurance, protected by this provision.

14 Prior to the entry into this agreement, BNSF had
15 whatever legal arguments it had. The 1995 agreement provided
16 whatever it provided, and we would come into the confirmation
17 hearing being able to present any of those arguments to
18 Your Honor.

19 This settlement agreement is more than just belts and
20 suspenders, because it is requiring Your Honor to find that the
21 releases contained in the 1995 agreement are in the best
22 interest of the estate and that they fall within the -- the
23 reasonable parameters for a settlement. This belt and
24 suspenders is inappropriate under this record, because there is
25 nothing in this record that addresses what the separate limits

1 of liability that do not appear to have an aggregate limit of
2 liability at all for personal bodily injury on the
3 indemnification side. The record is just simply not adequate
4 at this time to bring in this 1995 release that was never
5 approved by a court and that should not be approved today.

6 This is also -- the settlement agreement requires the
7 debtors to get a 524(g) injunction. The -- BNSF and other
8 parties have asserted objections to a 524(g) to Royal for
9 various reasons, including the fact that there has been no
10 contribution made directly to the trust under the policy that
11 the contribution made to the trust is not fair and equitable to
12 future claimants and other objections that this settlement is
13 seeking to tie up without the appropriate evidence to
14 demonstrate.

15 The 1995 agreement is what the 1995 agreement is. It
16 wasn't approved by the Court. There is no evidence to suggest
17 that there was something that should be -- that this additional
18 release, which is potentially worth several millions of dollars
19 according to the Libby claimants and several million dollars
20 according to BNSF, is appropriate and fair and in the best
21 interest of the estate.

22 THE COURT: Well, to the extent the claims are
23 asserted against Royal under the 1995 agreement and there is an
24 indemnity obligation on behalf of the estate for those claims,
25 to the extent that Royal is giving up those claims, that is in

Argument- Casey

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1 everybody's best interest it seems.

2 MS. CASEY: Your Honor, it's -- that appears to be
3 illusory, because if they have a 524(g) injunction which
4 absolutely and completely provides them the best protection
5 ever against anybody ever asserting a claim against them, they
6 would have no indemnification claims to come back to the estate
7 with.

8 THE COURT: Well, the plan provides for certain
9 indirect claims that can be adjudicated, and those would
10 probably be indirect claims.

11 MS. CASEY: Well, the -- to the extent that Arrowood
12 would have an indemnification claim, it would be an indirect PI
13 claim to go against the trust.

14 THE COURT: Right.

15 MS. CASEY: My point, however, is that it would be
16 getting a 524(g) injunction absolutely prohibiting any party
17 from asserting a claim directly against Royal, and all of those
18 claims would be channeled to the trust. So the value of those
19 indirect PI claims is zero. No claims could ever be asserted
20 against Royal, because 524(g) prevents it, and, in fact, this
21 agreement specifically provides that any claims that BNSF
22 asserts against BNSF's own insurance policies that are not
23 subject to the -- to the 524(g) injunction, that those
24 indemnification claims by Royal survive this agreement.

25 So the only indemnification claims that could

Argument - Casey/Cohn

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1 reasonably be in existence after the entry of a confirmation
2 order, which includes a 524(g) injunction, are not being
3 waived. What are being waived are ones that would be
4 eliminated by the very entry of the 524(g) injunction.

5 THE COURT: Okay. Mr. Cohn? That was a long way of
6 getting back to your initial argument, Mr. Cohn.

7 MR. COHN: Yes. Well, yes, Your Honor, and what I
8 want to do is finish our --

9 MR. SCHIAVONI: Your Honor, I would -- I'm sorry. At
10 some point, I would like to be heard on BNSF's objection.

11 THE COURT: Yeah. Actually, I didn't appreciate that
12 I was getting into BNSF first. So I would like to finish
13 Mr. Cohn's recitation, and then we'll deal with BNSF.

14 MR. SCHIAVONI: Okay.

15 MR. COHN: Thank you, Your Honor. Now, we have heard
16 -- we have heard that this is just -- that some of the things
17 that we're suggesting are just, you know, lawyer talk because
18 there is no record. Your Honor, the reason that there is no
19 record is because we've been denied discovery. That's the
20 whole -- the whole point of this.

21 The only thing that you have in the record as of this
22 moment, if it even counts, is you have an affidavit of
23 Mr. Finke. I did take Mr. Finke's deposition.

24 THE COURT: Well, the affidavit or declaration of
25 Mr. Schiavoni.

Argument - Cohn

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1 MR. COHN: Yes. That's true. The -- the nonestate -
2 - I should have been clearer. The only thing that you have
3 from the proponents of the settlement on behalf of the estate.
4 mr. -- you know, obviously, Arrowood as the -- you know, as the
5 -- as the nonestate party is always subject to a sort of, you
6 know, me thinks you doth protest too much kind of skepticism.

7 THE COURT: I don't know why. I mean, in this
8 instance, to the extent that Arrowood is high an excess carrier
9 as it -- as it professes, and I haven't heard anything that
10 indicates otherwise, there is no basis that Arrowood would be
11 compelled to settle upon but for the fact that the parties want
12 to resolve all of their --

13 MR. COHN: But --

14 THE COURT: -- relationship.

15 MR. COHN: Well, but that was not the position that
16 the estate has taken in the course of these negotiations.

17 THE COURT: But that's Arrowood's position.

18 MR. COHN: Right. Yes, Your Honor.

19 THE COURT: I mean, parties --

20 MR. COHN: That's --

21 THE COURT: -- bargain --

22 MR. COHN: Of course.

23 THE COURT: -- from a different perspective.

24 MR. COHN: Well, of course, Your Honor, and -- and in
25 that regard, Your Honor, the key issue from our perspective and

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1 the one that we were talking about earlier, which is why -- you
2 know, why give a release if there is no consideration for that
3 release. On that subject, Your Honor, I deposed Mr. Finke and
4 -- and asked him the question --

5 "Q So would you have any knowledge either personally or
6 through those communications with your counsel concerning
7 negotiation of the economic terms of the deal between Grace and
8 Royal?"

9 The witness answers, "No." No personal knowledge."

10 And I asked --

11 "Q Do you know whether in the course of the negotiations
12 between Grace and Royal there was any reference made to the
13 Libby claimants' contentions that coverage remains outstanding
14 for their claims under the Royal primary policies?"

15 And the witness says --

16 "A I do not know that. No."

17 So the one -- the one person who is tendered as a --
18 as -- as the estate -- as a -- as an estate proponent of the
19 settlement for us to depose turned out to have no personal
20 knowledge in what we regard as the key issue in terms of
21 approval of this settlement, and under these circumstances,
22 Your Honor, the consideration of this motion should be
23 deferred, and we -- the plan proponent should produce whoever
24 it is who is knowledgeable, who -- this negotiation was done by
25 somebody.

1 THE COURT: But what difference does the negotiation
2 make? The documents -- both documents, the 1995 settlement and
3 the 2009 agreement are pretty -- I think pretty clear. I don't
4 see a basis for going behind what the 1995 agreement says on
5 its face. I don't see a reasonable construction that indicates
6 that it does not also cover nonproducts liability. It clearly
7 does. The language of the -- is bifurcated. The language at
8 one section talks about bodily personal injury and in another
9 section, talks specifically about building premises and other
10 aspects of the coverage. So I don't know --

11 MR. COHN: Well --

12 THE COURT: -- where this is going, because I don't
13 think you get behind the face of the agreement if the agreement
14 is clear, and it seems to me the agreement is clear, the 1995
15 one. Then to the extent the 2009 agreement is asking for I'll
16 guess retroactive court blessing of the 1995 agreement to the
17 extent that it has to be incorporated into the 2009 agreement,
18 the issue is whether the overall settlement at this point is
19 fair on behalf of the estate and in the debtor's best business
20 judgment. That is the standard that the Court is to look at.

21 So the debtor is saying Arrowood is in runoff, we
22 don't know how long it's going to be around, we don't know for
23 what period of time anything will be collectible. We've
24 already received 100.0 million for the direct policies. These
25 are very high level excess policies. They're going to pay us

Argument - Cohn

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1 an additional 5.8 million, and in addition to that, not expect
2 us to pay back against any claims that we may have to reimburse
3 them for in the event that they ever arise under the settlement
4 that provided the indemnity. What's not fair?

5 MR. COHN: Well -- oh, I'm sorry, Your Honor. If --
6 I thought that we were on discovery. Obviously, the parties
7 have slopped over into the merits and I'm -- I'm happy to do
8 that, but --

9 THE COURT: Well --

10 MR. COHN: -- you have not heard me yet on the
11 merits.

12 THE COURT: No, I haven't, and that's I think what
13 I'm asking, because --

14 MR. COHN: Sure.

15 THE COURT: -- to the extent that the agreements are
16 clear on their face, I don't know that I need -- see the need
17 for discovery. To the extent that you're -- and I don't hear
18 you contending that the 5.8 million for the excess policies,
19 even if I could bifurcate this and say that 5.8 million is just
20 for the excess, there isn't an objection raised that that's
21 unfair. Why is it -- why is it not also in the best interest
22 of the estate that the estate get a release of all the other
23 claims that Arrowood may have against the estate in exchange
24 for the 1995 release? Let's put it that way.

25 MR. COHN: Well -- well, all right. The first -- the

1 first thing that we need to talk about, Your Honor, is the --
2 is the -- is the arbitrage between hundred cent dollars and
3 fractional dollars. If -- if there were to be any
4 indemnification claims, they're going to be paid at 25 to 35
5 cents on the dollar according to the disclosure statement. If
6 coverage is being left on the table, Your Honor, that could
7 have been pursued, then those are hundred cent dollars.

8 So -- so that -- so that the -- the surrender -- the
9 surrender of an indemnification claim in the face of a
10 meritorious claim for coverage is by definition a bad deal for
11 the estate.

12 THE COURT: Why? They've already been paid \$100.0
13 million. You can't --

14 MR. COHN: Because --

15 THE COURT: You can't excise out the fact that Royal
16 has already contributed \$100.0 million.

17 MR. COHN: Well -- well, you can, Your Honor, in the
18 sense that -- in the sense that -- that those were -- that was
19 -- that was a prepetition event. It has nothing to do with
20 whether coverage remains outstanding today.

21 THE COURT: Well, sure, it does. If they settled it,
22 it's not outstanding.

23 MR. COHN: No. That -- Your Honor, that I
24 understand, and let me -- and let me accept for the moment, you
25 know, we do -- we do disagree about whether the 1995 agreement

1 settled the coverage, but let's assume for purposes of what I'm
2 about to say that it did and that there is -- that therefore,
3 by its terms, there is no further coverage outstanding.

4 We have cited in our brief, Your Honor, the law not
5 only of the State of Montana, but also the doctrine that
6 appears to be prevalent in other jurisdictions as well, and you
7 see it in the insurance treatises, which says that once the
8 rights of a -- of an injured claimant vest in insurance
9 coverage, the action of the insured and the insurer cannot --
10 cannot settle the coverage out from under the person whose
11 rights have already vested, and that's important here, because
12 the settlement took place in 1995. By then, the injury to the
13 Libby claimants had occurred.

14 So all those -- all those Libby claimants who had
15 worked at the -- at the Grace facility or had been injured by
16 exposure to people who -- the dust that people brought home on
17 their clothes or just the ambient dust in the Libby -- in the
18 air of Libby, those people who had suffered those injuries had
19 always suffered them before this purported settlement dealt
20 away their rights.

21 Now, under -- under well established principles of
22 insurance law, again, as cited in the brief, those claims still
23 exist. As of this moment -- as of this moment, but for the
24 automatic stay, the Libby claimants would have the ability to
25 pursue Royal for that coverage and -- and get paid

1 notwithstanding even the 1995 settlement agreement, even
2 assuming that it did by its terms purport to settle this
3 nonproducts coverage.

4 Now, I do -- it's important to -- to note,
5 Your Honor, that when insurers settle products coverage --
6 let's say that you have -- let's say you had \$100.0 million
7 limit of products coverage and the insurer paid \$100.0 million
8 of claims or settled for 100.0 million or whatever. That
9 coverage is gone despite people's vested rights.

10 So the vested rights -- the vested rights of -- of
11 claimants matter only when you're talking about coverage where
12 the aggregate limits have not been reached, and -- and that's
13 why you're hearing this argument perhaps for the first time in
14 this case, because the focus here is on this nonproducts
15 coverage which does not have aggregate limits, and because of
16 that, Your Honor, because of that, we -- we have a situation
17 where what is being given up under this settlement with this
18 throw-in kind of release that -- that now extends not just to
19 the excess policies but that's going to now extend to the -- to
20 the nonproducts coverage, what that's going to do, Your Honor,
21 is that's going to take away valuable rights of -- of the Libby
22 claimants, and that's bad for two reasons.

23 first of all, Your Honor, because these are rights of
24 the Libby claimants, they're not property of the estate, and
25 therefore, cannot be taken away, or alternatively, even if they

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1 were -- even if it was --

2 THE COURT: The Libby claimants aren't named insured.
3 I mean, they may be injured, but the policies -- I think in the
4 mass tort context, it's been pretty clear that the proceeds of
5 policies belong to the debtor. They are -- that is property of
6 the estate. To the extent that it's going to be committed to a
7 trust, the claims by the Libby entities are going to go to the
8 trust to be resolved. They're not going to go directly against
9 the insurers.

10 MR. COHN: Well, and there -- and therein -- therein
11 lies the problem, Your Honor, because what's going to happen is
12 that the Libby -- rights that now under nonbankruptcy law,
13 which the Libby claimants have against the insurer, these
14 vested rights under this policy which -- which will pay --
15 which will pay 100 cents on the dollar to the extent that they
16 establish obviously that they -- the value of their claims,
17 what's now happening -- what's now going to happen as a result
18 of this settlement is that the -- the money is going to --
19 well, first of all, there is no money. Right? Because
20 remember, no consideration is being paid for this, but --

21 THE COURT: They're giving up rights, but okay.

22 MR. COHN: Well, but the 5 -- the 5.8 million was
23 calibrated solely with respect to the excess policy. Nobody is
24 -- they're not writing --

25 MR. LAUGHLIN: Objection, Your Honor. He's

1 testifying, as I pointed out in my last thing about the 5.8
2 million.

3 THE COURT: I think the evidence that I have so far
4 indicates that this is a package deal, that there were lots of
5 factors that were considered. So -- but I think I posited the
6 question. Let's just assume that the 5.8 is only for the
7 excess coverage. What is there that benefits the estate for
8 the other release going back to 1995, and to the extent that
9 you could put things in buckets, and I agree you can't, but to
10 the extent you can, one of the buckets would include the fact
11 that Arrowood is giving up the indemnity claims that it has
12 against this estate --

13 MR. COHN: All right. So let's --

14 THE COURT: -- and the fact that it's already paid
15 \$100.0 million, only 10 of which can possibly be aggregated to
16 the bodily injury coverage, because that's the limit of the
17 policy.

18 MR. COHN: Your Honor, once again, we -- I -- that --
19 that I -- that is not correct. I don't think that's anywhere
20 in the record that -- that the reasons why the price was
21 \$100.0 million in 1995, and I respectfully suggest my
22 understanding of it from the materials that I've seen, and
23 again, there point Mr. Lockwood. I can't testify about this,
24 because I've got not personal knowledge, but we've obviously
25 informed ourselves about this, and the reason for the \$100.0

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1 million price was not that the -- was not that the -- the
2 products -- I'm sorry -- was not that the nonproducts coverage
3 was being settled. That's not the delta between 10.0 million
4 and 100.0 million.

5 THE COURT: All right.

6 MR. COHN: It's -- it's defense costs. Now --

7 COUNSEL: Your Honor --

8 THE COURT: I'm sorry, but I cannot possibly in good
9 conscience imagine that it would take \$90.0 million to recover
10 10. I can't imagine any court approving that to the extent it
11 goes before a court. I can't imagine any client approving it
12 to the extent it's just related to a client.

13 MR. COHN: Well, Your Honor, there is -- I need -- I
14 need to point out there is really nothing -- there is nothing
15 in the record about this. If that's an important point, we
16 should -- we should have a record on it.

17 THE COURT: No. It isn't, because --

18 MR. COHN: Right.

19 THE COURT: -- like the current settlement, it's --
20 it is a package deal.

21 MR. COHN: Right.

22 THE COURT: So it encompassed whatever it
23 encompassed, but --

24 MR. COHN: Okay.

25 THE COURT: -- what is clear from the face of the --

Argument - Cohn

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1 of the settlement is that it encompassed more than bodily
2 injury coverage.

3 MR. COHN: That's -- Your Honor, you've said that.
4 As I say, we disagree, but for purposes of this argument, I'm
5 assuming -- I'm assuming that what you said is correct.

6 THE COURT: All right.

7 MR. COHN: The '95 agreement, let's assume that it
8 did -- that it did purport to dispose of all nonproducts claims
9 as well as -- as well as products claims related to asbestos.
10 We still have those vested rights, and so the effect of this
11 settlement is, if you just pick a number -- let's say that the
12 Libby claimants have \$200.0 million of claims. What happens is
13 that the \$200.0 million of potential coverage is being given
14 up, and if you say well, but that's an exchange for release of
15 the indemnification claim, the indemnification claim is worth
16 25 or 35 cents on the dollar. So it's -- it's -- if you take
17 30 cents, Your Honor, just to make the math easy, you know,
18 what the estate is getting is value of 60.0 million for giving
19 200.0 million, and the --

20 THE COURT: That's what settlements do. I mean,
21 settlements make exchanges.

22 MR. COHN: Well, but that's -- but that's a
23 settlement that by definition is an unfair -- is an unfair
24 settlement, because whatever the numbers are, the estate is
25 giving up three times as much as it's getting. The --

Argument - Cohn

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1 THE COURT: That doesn't -- that doesn't make it by
2 definition an unfair settlement. There are other things, like
3 the risk of recovery.

4 MR. COHN: Well, those -- those things can
5 legitimately enter into it, Your Honor, but now let me just
6 focus on whose ox is being gored here. Whose ox is being gored
7 is the Libby claimants. This -- these are rights that they
8 have outside of bankruptcy to pursue this coverage, and when
9 you talk about in the mass tort context these claims can get
10 channeled to a trust, well, you -- you can -- the reason that
11 claims get channeled to a trust in the mass tort context, the
12 reason they need to be channeled to a trust is because most of
13 those claims -- I'm sorry -- most of the coverage is products
14 coverage where there are aggregate limits, and if you let
15 everybody go out and just chase the insurer, then the first
16 people to get there who will recover, there will be this race
17 to -- to get -- to get coverage, and -- and among other things,
18 it would leave the future claimants whom -- whom Mr. Guy is
19 bound to protect, it would leave them without any remedy
20 against the insurers, and so in order to follow the mandate of
21 Section 524(g) to treat present and future claimants equally,
22 you have no -- you have no choice, and therefore, you have a
23 justification to -- to channel products coverage to the trust.

24 In the case of nonproducts coverage where there is no
25 limit and where anybody can go ahead and pursue the -- can

1 pursue his claim and it doesn't take away from what the next
2 guy is going to get or the guy after that, in that -- in that
3 circumstance, Your Honor, I respectfully submit there is no
4 justification to take away our client's insurance coverage,
5 which -- which could be worth a great deal to them, and just
6 throw it into this pot where -- where the Libby claimants are
7 going to get a very -- a very small share of it.

8 Their -- their interest in this -- their interest in
9 this is either a property interest which cannot -- of theirs,
10 not the estate's, which cannot be taken away by action of -- in
11 the bankruptcy or -- or the context of -- the context of
12 Grace's bankruptcy, or alternatively, Your Honor, it is -- it
13 is a property in which the Libby claimants have a sufficient
14 property interest under the vested rights doctrine, that they
15 deserve adequate protection, and adequate protection,
16 Your Honor, should take the form of -- of setting aside funds
17 that -- representing the value of the coverage and providing
18 them with -- with adequate protection, and otherwise,
19 Your Honor, we respectfully submit the settlement cannot be
20 approved.

21 In addition, Your Honor, that's -- that's one
22 argument against the -- against the settlement, Your Honor.
23 The -- the other argument, Your Honor, and I think you -- you
24 saw this in our papers, is that the -- the settlement bears a
25 very strange relationship to Section 524(g).

1 What happens is that the estate binds itself, and
2 when I say the estate, this is an obligation that's going to
3 end up with the asbestos PI trust. The asbestos PI trust is
4 supposed to indemnify Royal up to the full \$5.8 million
5 settlement amount against -- against any claims against the
6 Royal -- the Royal parties as defined in the -- in the
7 settlement.

8 Now, those Royal parties go beyond the people who can
9 be or who are protected by 524(g) injunction. So in other
10 words, this is not just one of those indemnity obligations that
11 kind of backstops, you know, the injunction, where if for some
12 reason the injunction were to fail of its terms or whatever,
13 then -- you know, then as a backup, we say okay, we'll
14 indemnify you for any damage.

15 This is an indemnification by the asbestos PI trust
16 of people who are not protected by the injunction and who under
17 the terms of Section 524(g) cannot be, which means the entire
18 \$5.8 million is -- is a losery consideration, because that
19 5.8 million, you know, could go out the door in indemnification
20 costs, but it's also an improper settlement, Your Honor. How
21 is that we're -- through the back door of this indemnification,
22 how is it that we are providing Royal with a release beyond
23 what they could get if we were standing here straightforwardly
24 at plan confirmation talking about the scope of Section 524(g)
25 and what -- and what any insurer is entitled to get?

Argument - Cohn

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1 And I would add, Your Honor, that -- that the
2 interrelationship of this settlement with -- with Section
3 524(g) is such that really, the settlement amounts to -- to a
4 subrosa plan. To put it another way, if the debtors were now
5 to turn around -- if the debtors are now committing themselves
6 to -- to pursue at confirmation a plan that's now -- that's
7 inconsistent with Section 524(g), and that's certainly -- that
8 certainly implicates and is the kind of issue that ought to be
9 heard in conjunction with confirmation of the plan.

10 THE COURT: This is the first time I've ever heard
11 that the debtor can be accused of having a subrosa plan when
12 the debtor has got the plan on the table. I'm having a little
13 difficulty with that concept, frankly, but I understand the
14 point you're making, but --

15 MR. COHN: It's -- it's really, Your Honor, that this
16 settlement should be considered in conjunction with
17 confirmation of the plan. We're not that far away from the
18 confirmation hearing, Your Honor. There would really be very
19 little harm to anybody to just take it all in one fell swoop,
20 and what we would avoid is the possibility, Your Honor, that
21 the debtors -- if they get the settlement approved today, that
22 means that if they now don't pursue a settlement which is
23 contrary to Section 524(g) at confirmation, they're liable to
24 damages as an administration claim, because Royal will take the
25 position you breached your obligation under the settlement

Argument - Cohn

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1 agreement to pursue it -- to -- to implement it in good faith.

2 So to avoid that conundrum, frankly, Your Honor -- I
3 call it a conundrum, but, I mean, it's -- you know, this could
4 be real dollars out the door -- why not just take the extra
5 several weeks and -- and put this on for the confirmation
6 hearing?

7 THE COURT: All right. And who is it under the
8 settlement that you contend would not be entitled to the 524(g)
9 injunction?

10 MR. COHN: It is everybody in the definition of Royal
11 parties except for Royal itself -- excuse me. Arrowood has
12 been represented to be the successor to Royal. If that's true,
13 Arrowood, of course, is entitled to a Section 524(g)
14 injunction, and -- and I'm sorry, Your Honor. I'm blanking. I
15 think we said in our papers there might be one other exception,
16 but the whole panoply of Royal parties who are affiliates and
17 people who have anything to do with Royal and directors and
18 officers and -- and related companies now or in the future, all
19 those people are just ineligible under the terms of Section
20 524(g).

21 THE COURT: All right.

22 MR. COHN: And by the way, they're ineligible,
23 Your Honor, not just because they're beyond the scope in the
24 sense not person who can be protected. They're also people who
25 are not identifiable by the terms of the injunction. When you

Argument - Cohn/Bernick

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1 look at that definition of Royal parties, Your Honor, it just
2 -- it doesn't name people by name. It just gives you these
3 whole kind of categories and relationships, and that is not
4 sufficient for purposes of -- to make them identifiable within
5 the meaning of Section 524(g).

6 THE COURT: All right.

7 MR. COHN: Thank you.

8 THE COURT: Let's finish up with --

9 MR. BERNICK: Yes.

10 THE COURT: -- the Libby claimants. Okay.

11 Mr. Bernick?

12 MR. BERNICK: Yes. I think that they're really --
13 the Libby claimants I don't think should take long nor would
14 the BNSF people, but I want to start out with the distinction
15 that Mr. -- Mr. Laughlin made before I withdraw something which
16 is that when it comes to the merits of the motion to approve,
17 that is, was this a good deal or not, and, of course, the
18 standard there is quite flexible.

19 There really is no record that's been provided by
20 either BSNF or the Libby claimants that says this is a deal
21 that falls below the very generous threshold that's set by the
22 law as being a deal that is a good exercise of business
23 judgment as in terms of the creditor. They don't have any
24 sufficient -- they have a lot of arguments. They have
25 absolutely no sufficient, and Your Honor now has heard a review

1 of the very robust record that has been submitted by the plan
2 proponents and by Arrowood that demonstrates why this deal is,
3 in fact, a good deal, and, of course, Your Honor would expect
4 no less, as I said, in the process given the people who are the
5 adversaries in the case.

6 The law is very clear on what the test is. The law
7 is very clear on what the elements of the test are, and the
8 record is, without exception, with respect to those elements of
9 the test at this point undisputed, and while there may be
10 arguments about whether the burden has been discharged, that
11 is, whether just taking our evidence, which is the only
12 evidence at this point where the burden has been met, I think
13 that as Your Honor has reviewed the matter this morning, I
14 think it's quite clear that that burden has been satisfied.

15 So the real objections that are now being made are
16 really of a different ilk. The objection that are being made
17 is that both the Libby claimants and the BNSF people say that
18 they have their own property right with respect to these
19 matters, and not only do they have their own property right,
20 but that that property right trumps -- trumps the decision to
21 settle and the basis for the settlement, and that really is
22 what's being said here, and so I want to talk a little bit
23 about the trumping idea.

24 It's got two elements. One is do they, in fact, have
25 an interest in this property to begin with, and the second is

1 does it trump. It's not a question of do they have the
2 interest. I think we've heard that what is perplexing even to
3 try to parse out from Mr. Cohn, as able an advocate as he is.

4 1995 -- he says well, there was a settlement in 1995,
5 and he asserts that he's got claimants who have a vested
6 interest. Now, as of 1995, to have a vested interest, that is,
7 to be able to have the ability to say you can't settle that
8 policy because we have got -- we've got an entitlement to it,
9 A, they weren't known because they hadn't asserted a claim; B,
10 for all we know -- that was 15 years ago. There undoubtedly no
11 manifestations, no diagnosis, and they didn't even know
12 themselves who they were.

13 So to the extent that we're talking about people who
14 have this, quote, vested interest, those are people who were
15 unknown, unknowable, indeed, did not exist as plaintiffs,
16 because their claim did not exist. So there is no vested
17 right, because there was no right and it couldn't vest, and to
18 the extent that they did exist, there was no assertion of that
19 right against the settlement, and the settlement took place.
20 It resolved the matter.

21 So as Your Honor has well indicated, by 1995,
22 nonproducts is resolved. It's a done deal. That's all she
23 wrote, and because the Libby claimants are only asserting --
24 you heard from Mr. Cohn this morning -- are only asserting that
25 they have nonproducts type claims, Mr. Cohn is sitting here 15

Argument - Bernick

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1 years later now representing Libby claimants who presumably do
2 have a claim, is talking about people who are nonproducts types
3 of claimants with respect to a matter that was long ago
4 resolved. The people today have no right, have no property.
5 There is nothing left. They have no property in which a right
6 can vest, and that's just a fact.

7 So he says I've got this legal theory and this kind
8 of claim of vested interest, but he is 15 years wrong. That
9 was a done deal in 1995. There was no interest at that time.
10 So whatever the theoretical argument might be, it does not
11 connect up a right with the property that we're talking about
12 today. I think that with respect to the Libby claimants, the
13 predicate for the theory is wrong.

14 With respect to BNSF, BNSF gets it wrong also on the
15 facts, and I have a short point about the law, and then I'll
16 sit down. With respect to the facts, it all comes back down to
17 -- and the case that they cite is a case that went off on
18 different facts. This is Eleventh Circuit decision, went off
19 on different facts where the court construed not -- not
20 selected for publication in the Federal Reporter. I don't know
21 what the rule is in the Third Circuit. I know that that got a
22 lot of debate in connection with the rules a little while ago,
23 but this is a case that actually parsed the policies and parsed
24 the contract and found that there was expressly the creation of
25 a lessee, I think, as an additional insured.

Argument - Bernick

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1 Well, what do we have on the facts of our case? We
2 have in the facts of our cases the endorsement, and the
3 endorsement says not that the railroad is an additional
4 insured, but that the insurance company -- that because the --
5 because the company -- actually, that is, that Grace has
6 assumed liability under contracts and paid an additional
7 premium, the insurance company now is providing coverage to
8 Grace by reason of this contract with the predecessor of BNSF.

9 So the coverage and the endorsement is an endorsement
10 as to Grace in recognition of the fact that Grace has
11 contractually assumed certain liabilities. Incidentally, it's
12 not clear that these are the liabilities that are issue. This
13 is some suspension bridge and conveyor belt contract, all kinds
14 of properties where liability could arise at the Libby mine
15 that required insurance.

16 So the endorsement itself is not an endorsement that
17 creates BSNF as an additional insured. It's an endorsement
18 that says that the scope of coverage as to Grace extends to
19 Grace's entry into a contract with BSNF. It's completely
20 different, and in case there is an ambiguity, this is a letter
21 dated August 22 of 1955 from the Detroit Insurance Agency to
22 Great Northern Railway Company, which was the name of the
23 company at the time, regarding Zonolite, and the insurance
24 agency sends this letter -- sends this letter to Great Northern
25 Railway, and it gets it exactly right. The policy in question

1 provides liability coverage for only Zonolite Company including
2 their contractual agreement with the Great Northern Railway
3 Company and Zonolite Company and provided separate insurance to
4 take care of damage to the suspension bridge and conveyor belt
5 as well as workmen's comp -- workmen's compensation for their -
6 - for their client.

7 So the liability is liability coverage for Zonolite
8 only and sweeps in the contractual agreement -- arrangement.
9 This is confirmation at the time that this is not a insurance
10 policy that makes BNSF or Great Northern an additional insured.
11 It's an insurance policy that gives additional protection to
12 Grace and by virtue of or because of Grace's separate
13 contractual arrangement with respect to BNSF.

14 So neither Libby nor BNSF have established the
15 predicate for the argument, which is that, in fact, they have a
16 vested right with respect to the policies, which then leaves
17 the fundamental legal question, which is actually kind of
18 perhaps more interesting than the facts, but even more bizarre.

19 Outside of bankruptcy, if we were not in bankruptcy,
20 some of these arguments might be made that there is a vested
21 right, et cetera, et cetera. We think that -- we know that on
22 this record, they have not established that as a matter of
23 fact. So whether we're in or out of bankruptcy, they ain't
24 there with respect to this theory, but the proposition that's
25 being advanced by both of these companies, both of these

1 objectors here is in bankruptcy, and with respect to both of
2 these objectors in bankruptcy, what they're essentially saying
3 is that the vested right that they believe they have in these
4 policies means that the debtor and the other plan proponents
5 and Arrowood cannot, in fact, settle these policies, we're not
6 in control of the process because of these vested rights. That
7 is an extreme proposition that nowhere enjoys support in the
8 law, and, in fact, the whole code process would be turned on
9 its head were that approach to be adopted.

10 We have Section 541(a), definition of property. We
11 have Section 363 that permits the sale of assets, and we have
12 9019, which is the process pursuant to which those arrangements
13 are approved. The whole concept -- not concept but the express
14 provisions of the code contemplate and require that when it
15 comes to insurance policies, it is the debtor that is given the
16 ability to exercise its business judgment to bring the value of
17 that policy to bear in the estate by settlement, and then after
18 that, the people want to quarrel about what's going to happen
19 with the proceeds. They can quarrel about what's happen --
20 going to happen with the proceeds.

21 Otherwise, any creditor that might be able to argue
22 some interest or some right could hold up and hold hostage the
23 whole resolution process with regard to the policies. That is
24 exactly the opposite. It's the settlement of the policies that
25 comes first, and it specifically authorized, indeed, driven by

Argument - Bernick

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1 the bankruptcy code, and the creditors are kind of off over
2 here waiting to see what's going to happen.

3 There is no law for the proposition that by virtue of
4 -- certainly of the position that these people are in, but no
5 law for the proposition that says that the settlement process
6 itself cannot take place because other folks may have an
7 interest in the proceeds. If a settlement is a fair settlement
8 is a fair settlement, the proceeds then come into the estate,
9 and people can quarrel about what happens to them. That's
10 where we are today.

11 All the arguments about 524(g) and well, geez, you
12 know, it's really perverse, here is what's going to happen,
13 that, God bless, is for another day. It's another day soon if
14 it has any credibility to those arguments, but 524(g) is not
15 why we're here. We're here simply to approve the settlement of
16 these matters. It is a core process under the code --

17 THE COURT: Well, am I being asked to bless in
18 advance of the plan confirmation the fact that this policy says
19 that, for example, Royal affiliates, Royal's officers and
20 directors are going to benefit from a 524(g) injunction?
21 Because if I am, then I am not willing to do that absent the
22 plan confirmation process.

23 MR. BERNICK: Yeah. I -- I can't speak to the
24 related parties' point, and therefore, I will not, but what I
25 am speaking to is the settlement, the terms of the settlement

Argument - Bernick/Schiavoni

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1 themselves and whether this is a fair and appropriate
2 settlement, and I believe that's what's up for today.

3 THE COURT: But that is a term of the settlement,
4 that the debtor at least will --

5 MR. BERNICK: It is --

6 THE COURT: -- will propose.

7 MR. BERNICK: -- a term -- it is a term of -- it is a
8 term of the settlement.

9 THE COURT: Right.

10 MR. BERNICK: That is correct.

11 THE COURT: And I have some difficulty --

12 MR. BERNICK: I understand that.

13 THE COURT: -- judging 520 --

14 MR. BERNICK: So rather than put myself at risk of
15 misspeaking, I'll let Mr. Schiavoni --

16 THE COURT: You need to use the microphone.

17 COUNSEL: No, he doesn't.

18 MS. SCHIAVONI: Judge, the -- the approval order
19 doesn't require you to issue a 524(g) injunction. It doesn't
20 issue any injunctions. It simply approves the settlement, and
21 it commits the debtors to sort of go forward with best efforts
22 on the 524(g) issues.

23 On the -- on the issue of the specific who -- naming
24 of the parties, that is not in the approval order, and that
25 could be deferred until later, but I will tell you this, Judge.

Argument - Schiavoni

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1 Maybe we could resolve the mystery on it now, because we're
2 seeing protection for Royal. It's -- the company that's now
3 the successor in interest to it is Arrowood. Okay? And the --
4 the company that is the parent company of them, Arrowpoint
5 Capital. To the extent they're sued as a successor in interest
6 or what not, they -- the three of them are traditionally --
7 would be covered. They're covered in all the settlement
8 approval orders that -- that you have done generally, and we're
9 seeing protection for the officers and directors of the
10 company. I think that's well within 524(g), but --

11 THE COURT: I don't --

12 MR. SCHIAVONI: -- but we can defer that on the
13 officers and directors if you'd like.

14 THE COURT: I --

15 MR. SCHIAVONI: And that's not in the approval order
16 either.

17 (Tape change)

Argument - Schiavoni

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1 THE COURT: Well the problem is, is the approval
2 order incorporating the settlement as stated. Because if it
3 is, then I've done it anyway. And I am not willing to do that.
4 I don't think it's appropriate that I determine 524(g) issues
5 in advance of determining all the 524(g) issues.

6 MR. LAUGHLIN: Well, Your Honor, the 524(g) objection
7 is, in effect, a condition subsequent to performing under the
8 agreement. You can approve the settlement and if the plan
9 proponents can't deliver what the agreement requires, then the
10 agreement won't be consummated on the effective date.

11 THE COURT: Well maybe you want to discuss that
12 issue. Okay. That's fine. I will simply -- I think what I
13 can do is indicate in an order that, to the extent that there
14 are any 524(g) issues, they'll be addressed in the plan
15 confirmation process.

16 MR. SCHIAVONI: I think we can do -- that's fine,
17 Your Honor. I mainly wanted to let you know that we weren't
18 really intending to do anything sort of funky, or really
19 unusual. To the extent that there's disagreement on it, we'll
20 deal with that later.

21 But it's not way out in the realm of craziness. Just
22 a couple of --

23 THE COURT: As to the companies, I don't think it is.
24 It seems to me that that's what the 524(g) injunctions normally
25 do.

Argument - Schiavoni

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1 MR. SCHIAVONI: Okay. Your Honor, just a couple of
2 other quick points. This is the first I think it may actually
3 be the first insurance settlement in 7 years in this case.
4 Certainly within years. Okay. This is something that has the
5 potential really to pave the way to resolve, not just my
6 problems, but a whole series of objections if -- there were a
7 lot of objections on that -- there was a lot of paper.

8 In fact, I would say there's about a foot of paper
9 that goes -- that has --

10 THE COURT: Is that all?

11 MR. SCHIAVONI: -- that has similar problems to me.
12 And I think, you know, in large part, because of that, the
13 estate representatives, all of them, worked very, very hard to
14 try to flesh out a fair resolution on this, that could be used
15 for others.

16 So I would tell you this settlement has some real
17 importance, (a). (b) you know, as far as this issue of some of
18 delaying the thing, Your Honor, I think there's a lot of
19 reasons to move this forward.

20 One is, for that very reason, that it will sort of
21 pave the way to perhaps get some others done. I think there
22 might have been a settlement even filed last night that is
23 generally along the lines of, you know, dealing with problems
24 like mine, with these contractual indemnities.

25 The other thing, Judge, is in the settlement

1 agreement itself, I have all these litigation I stand down
2 provisions. And deferring this thing, you know, it poses a
3 real problem. And, you know, candidly, Mr. Cohn knows that.

4 And he's not beyond using -- you know, using that as
5 a sort of a weapon to sort of delay us here. So that we --
6 that's another reason to move forward.

7 Just one other thing is, as far as balancing all of
8 the consideration given here. We've talked about the
9 consideration, but we didn't sort of talk about at all is the
10 claims, the sort of like, what Mr. Cohn's claims are.

11 Because you do sort of balance them a little bit.
12 Judge, just so that we're all on the same page, I talked about
13 those excess policies being -- you can't see them on a bright
14 day. With respect to the policies he's talking about, it's
15 very important you understand, those policies were issued
16 almost 50 years ago.

17 I was one year old -- or I think, when the first --
18 when the last policy went into effect. To the extent anyone's
19 claiming occupational, you know, and exposure that's
20 occupational, they'd be over 70 years old, at this point.

21 We do not think that under the wildest of situations
22 there would be really any real claims left against those
23 policies.

24 It's a factor that I think goes into the overall
25 consideration. The cases all here teach about deferring to the

Argument - Schiavoni

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1 business judgment of the debtors. What we're looking at here
2 is the lowest of the realm of reasonableness. It's not, you
3 know, the highest, as Mr. Cohn would point out.

4 He has, and this is a point you can't emphasize
5 enough, neither Mr. Cohn, nor BNSF, have put in one ounce of
6 proof, no declaration, no exhibits, they don't cite to
7 depositions.

8 They cite to nothing. There is no proof to counter
9 the proof that the debtors in there would have put into the
10 record.

11 In addition to that, Judge, I would suggest that
12 there's a case that almost deals point blank with this type of
13 situation. And it deals with both Libby problems and BNSF
14 problems.

15 In re Dow Jones (sic). It's a bankruptcy decision
16 coming out of Michigan. But it talked specifically about how,
17 when somebody objects to a coverage settlement --

18 UNIDENTIFIED SPEAKER: Dow Corning.

19 MR. SCHIAVONI: Dow Corning. On my Corning's I just
20 sort of -- I have problems mixing them all up. But it talked
21 specifically about how a court -- I have to have Mr. Bernick
22 teach me how to do this, but I can't --

23 (Laughter)

24 MR. BERNICK: Judge, it's a factor decision and it's
25 quoted in the brief. We were involved in that case. It is

Argument - Schiavoni

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1 really a very well written decision.

2 MR. SCHIAVONI: Well, clearly, it was briefed and --

3 (Laughter)

4 THE COURT: I'll tell former Judge Spector you're
5 fond of his opinion.

6 MR. SCHIAVONI: It talks about, when a court's
7 confronted with objections to coverage settlements, a debtor's
8 not required to pursue every possible theory of coverage,
9 regardless of the likelihood of recovery.

10 And the court specifically says that, look, when
11 you're faced with multiple different possibilities, you really,
12 you don't have to follow every one.

13 And that's what you're being asked by Mr. Cohn to do,
14 and I don't -- I think that case speaks directly to that. On
15 the BNSF front, this case deals directly with this vested
16 rights issue.

17 And perhaps Your Honor looked at it when you saw the
18 briefing, so I won't belabor it. But it hammers upon another
19 point that's very, very important. And that is that, if you --
20 if one were to buy into this theory that Mr. Cohn has
21 articulated, it basically would sort of bring the whole world
22 of mass tort settlements to a complete halt.

23 Because it would make it utterly impossible to settle
24 with anyone pre-petition. And it would make it virtually
25 impossible to reach settlements in the asbestos context at all.

1 If our corporate representative, who's here, was
2 called to testify, he would tell you just that.

3 Mr. O'Reilly (phonetic), that if, and to the extent
4 this was the case, we would -- it would be impossible to reach
5 settlements. It is vitally important to Arrowood to have a
6 complete settlement here.

7 On the BNSF front, I don't think I need to add much
8 to what Mr. Bernick put on the record. Except I will say one
9 thing. He didn't mention that one of his own people testified,
10 was questioned about this issue about whose named as an insured
11 on the Grace policies.

12 That was Mr. Hughs (phonetic). And we cite in the
13 record that deposition testimony. We offered it in connection
14 with and we designated in connection with the phase 1
15 proceedings.

16 And he testified clearly that BNSF is not designated
17 as either a named insured or additional named insured. And
18 that they're not an insured under these endorsements. It's a
19 -- that's the only evidence, essentially, directly on the
20 record on that issue.

21 We offered -- we had someone independently, a former
22 chief litigation counsel in-house for Reliance Insurance, a
23 Fortune 500 company, review all -- review these policies.
24 Review this claim by BNSF. Mr. Bert Hines (phonetic), he's a
25 nationally recognized expert in this field.

Guy - Argument

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1 We offered to BNSF to allow -- to have them depose
2 him on Friday. They declined. They didn't want to depose him,
3 Your Honor. We haven't put in a declaration from him, but we'd
4 be -- he's -- we have him here also today, sitting in the back
5 of the courtroom. He'd be prepared to say he's reviewed the
6 policy, and that BNSF is not named as an insured or an
7 additional named insured, and they're not an insured under
8 those endorsements.

9 And he, by the way, Your Honor, would also, if called
10 to testify, testify that he is licensed in the State of Montana
11 to teach a course on additional named insured's.

12 As -- in addition to his other areas of expertise.
13 And he's licensed to do that -- that course for insurance
14 professionals in getting continuing education credits there.

15 Your Honor, we'd ask that the settlement be approved.

16 THE COURT: Mr. Guy?

17 MR. GUY: Your Honor, you're being remarkably
18 patient, so I won't be long. On BNSF, as the other parties
19 have stated, there's no evidence, and we did look at their
20 brief, which had nothing attached to it, no declaration, no
21 policy.

22 Some of the policies that they cite, we haven't even
23 been able to find. We don't think they exist. And I could go
24 through the whole brief, going through similar instances like
25 that.

Laughlin - Arguments

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1 But I think it's improper to make these arguments
2 without the factual support, the evidentiary support. The
3 bottom line is, everybody worked really hard on this
4 settlement. All the creditors are supporting it. The ACC's
5 supporting it, the SCR's supporting it, the debtor's supporting
6 it, and Royal supports it. No one has argued it's in bad
7 faith.

8 No one has argued that the consideration is
9 inadequate. What they're arguing is, by reference to theories,
10 that they have provided no support to you. And I would ask
11 that it be approved. It is absolutely critical, we are working
12 right now, contemporaneously with multiple parties to get
13 settlements before the Court so we can streamline this
14 bankruptcy.

15 If a party is allowed to come in and say, well, I
16 have this theory, but I'm not going to back it up, to derail
17 and delay settlements, we won't be successful in that regard.
18 Thank you, Your Honor.

19 THE COURT: Mr. Laughlin?

20 MR. LAUGHLIN: A couple of points, Your Honor. I
21 never thought I would say this, but in response to Mr. Cohn's
22 vested rights arguments, he repeatedly asserted that there was
23 established law that insured's couldn't settle where there was
24 an accrued claim against the insured, the insurer couldn't
25 settle.

Laughlin - Arguments

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1 First, the reason I wouldn't have thought I'd ever
2 say this, is if you read the Arrowood reply brief, they do an
3 excellent job of demonstrating that, in fact, the established
4 law is to the contrary, and that the Libby claimants are taking
5 two -- basically a couple of cases, some very old, and taking
6 them out of context.

7 And if you think about it, the proposition that Mr.
8 Cohn, and also BNSF, because BNSF the claims -- the contracts
9 that they rely on, the policies that they rely on, are the
10 policies that were the subject of the 1995 settlement
11 agreement.

12 They are not the excess policies. So if those
13 policies were settled as to the Libby claimants, they were also
14 settled as to BNSF.

15 And BNSF is basically trying to make the same
16 argument, when you get right back down to it, that Libby is,
17 which is that they have rights under those policies, and that
18 the settlement doesn't, to use Mr. Bernick's words, trump that.

19 If you think about the implications for that, what
20 you're saying, ineffect, with long tail torts, and we're not
21 just talking asbestos here, we're talking about any --
22 environmental claims, we're talking about any claim where the
23 activity began a whole -- a very long time ago.

24 But there's been no assertion of the claim and no
25 manifestation of the injury.

Laughlin - Arguments

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1 And an insurer and insured that have a dispute about
2 policy coverage limits, whatever, could never settle any
3 policies. They just couldn't do it. Because under this vested
4 rights theory, there would always be people with long tail
5 claims as to whom the settlement would not be binding.

6 And you don't need, with all due respect to Mr.
7 Schiavoni, you don't need an expert to figure that out. I
8 mean, it's inherent in the nature of the argument that's being
9 pressed here.

10 And while I think Mr. Bernick is correct that in a
11 bankruptcy context you have even a further overlay, if you
12 will, of the interests of the debtor's estate and its creditors
13 to look at on that, the fundamental question is, is this Court
14 going to accept an objection by these two objectors, that
15 essentially say that as to -- that no settlement can ever be
16 made that takes away somebody's "rights," because they're
17 vested through injury?

18 This argument is being made now with respect to the
19 1995 settlements. We have a whole lot of insurers out there
20 with unsettled coverage.

21 In theory, the argument could be made by any
22 dissident asbestos claimant with respect to, if we come into
23 this Court with a settlement of unsettled coverage, that you
24 can't settle this without my permission, because I have vested
25 rights. And you cannot divest me of those rights.

Laughlin - Arguments

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1 Now Mr. Cohn sort of cavalierly says, well, in a
2 524(g) context, with products limits, you can do that. But, I
3 mean, he's just making that up. I mean, his argument is, in
4 effect, an argument that I have a property right and you can't
5 take it away from me.

6 And it's not at all clear to me why 524(g) would
7 authorize you to take away somebody's property right if, you
8 know, the general principles of Section 363, which is what's
9 being invoked here in the settlements, this is a policy
10 buyback, in effect, would produce a different result.

11 So, I mean, I think it's really important for us to
12 understand what's at stake here. This is not just some, let me
13 apply my Montana case on a motor vehicle accident where, after
14 the accident the insured gave his -- made a collusive deal with
15 the insurer.

16 Which is the one Montana case -- and putting aside
17 for the fact that you would also have the problem of, Grace's
18 insurance is -- governed by New York law, but they claim their
19 exposure was in Montana, so how many other people are going to
20 have claims under other state's laws?

21 And are we going to have 50 state laws apply to these
22 policies? I mean, that's just a sort of an additional overlay.

23 So I suggest to you that it is simply not reasonable
24 or sensible to think that the arguments that are being made
25 about vested rights here can or should be adopted by this

1 Court, given the implications of them and given the very, very
2 feeble legal authority in support of them.

3 Oh, and the other has to do with the business about
4 the scope of the protection, the 524(g) order. And Mr. Cohn
5 made an argument that sort of said, you can't give the 514(g)
6 injunction, because they don't qualify, which is premature.

7 It's clear that, if we can't deliver the 524(g)
8 injunction, then either Mr. Schiavoni's client will walk the
9 deal, or we'll renegotiate it.

10 But the other thing he argued was that, well, there's
11 an indemnity that's separate from the 524(g) protection that
12 would cover these people.

13 So the trust, if it couldn't deliver the 524(g)
14 injunction, would nevertheless be on the hook for the
15 indemnity, which equals the total amount of the consideration
16 being paid in the first place.

17 And with respect to that, I would simply say that,
18 Mr. Cohn has made no effort to show why, under Montana law, or
19 any other law, a Libby claimant, or for that matter BNSF if it
20 wanted to adopt this argument, would have a claim against the
21 officers and directors of Royal.

22 When the only connection that the Libby claimants
23 have with Royal, is the issuance of an insurance policy. And,
24 of course, the one thing that 524(g) does protect people
25 against, is claims based on the provision of insurance to the

1 debtor.

2 So it seems to me, we've either got a situation here
3 in which the 524(g) injunction will be determined to be proper
4 at the end of the day, because it applies only to the extent
5 that it applies.

6 And, I mean, it's only going to enjoin claims by
7 people who are suing officers and directors for insurance
8 coverage. That would have to be -- that's the only possible
9 claim that one could even theorize.

10 Or alternatively the claims are just being
11 hypothesized out of whole cloth.

12 THE COURT: But it's not for today.

13 MR. LAUGHLIN: The 524(g) piece of it is not for
14 today. The challenge to the fairness and reasonableness of the
15 agreement, because it has an indemnity, which might go beyond
16 the scope of the 524(g), is here today. And I'm simply arguing
17 that to argue that in effect the 5.8 million dollars of
18 consideration is going to go out the back door, via the
19 indemnity, so the debtors and the trust aren't going to get
20 anything out of the deal, is wholly misguided in the absence of
21 showing of any realistic possibility that such a claim that
22 would trigger that indemnity against an officer and director,
23 could be made by the Libby claimants or anybody else under any
24 applicable law.

25 There's -- it's just a total failure of proof with

Casey - Argument

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1 respect to that argument. And I suggest to you that it borders
2 on the preposterous on its face.

3 Because I'm not aware, and I suspect you're not
4 aware, of the notion that insurance companies can get --
5 officers could get sued because somebody didn't get to collect
6 on some insurance policy that they made a settlement of.

7 Thank you, Your Honor.

8 THE COURT: Okay. BNSF you have counsel, would you
9 like to address this issue, because I'm going to wrap this up.

10 MS. CASEY: Your Honor, the settlement agreement
11 purports to settle, not just the excess policies that were
12 found, but to wrap in the 1995 agreement.

13 BNSF has filed objections to the plan that the
14 debtors and the parties were aware of before they entered into
15 settlement agreement, that stated that the 1995 settlement
16 agreement did not settle that portion of the endorsement that
17 has been provided to Your Honor that shows the separate policy
18 limits.

19 And that if it had, the Royal is not entitled to a
20 524(g) injunction, because it was not sufficient. There was
21 not sufficient consideration.

22 In addition, BNSF filed an objection to the plan that
23 says that the 100.0 million dollars that was paid previously,
24 was paid to the pre-petition debtor, it was not paid to the
25 asbestos PI trust and it was not paid in exchange for the

Casey - Argument

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1 release for the future claimants.

2 And, therefore, there's not -- they're not entitled
3 to the 524(g) injunction.

4 THE COURT: Well that issue, the entitlement to the
5 524(g) injunction, I'm not addressing today. The settlement
6 commits the debtor to propose that injunction and to do its
7 best efforts to obtain it.

8 And I think Mr. Laughlin correctly stated that the
9 condition is that if the debtor -- the plan proponents can't
10 deliver, then this settlement won't take effect.

11 It's conditioned on that. I'm not prejudging the
12 524(g) injunction. But I am looking to the issues concerning
13 the fairness of this settlement.

14 I don't see how BNSF has rights under these insurance
15 policies. It has a collection action that could be brought
16 against the debtor, and the debtor in turn can then present its
17 claims over to Royal.

18 But BNSF will be treated in the plan by raising their
19 claims against the debtor, to the extent that they exist
20 anyway. So I can't see how BNSF is in anyway jeopardized by
21 this settlement.

22 MS. CASEY: Well let's assume that BNSF does not have
23 the rights and the question is, is the settlement fair and
24 equitable as to the parties?

25 There's been a lot -- as to the creditors. There's

Casey - Argument

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1 been a lot of statements that BNSF and Libby claimants haven't
2 provided any proof. However, one of the things that I will say
3 is that there's a 1995 agreement that purports to have paid a
4 100.0 million dollars to release the claims. And the parties
5 have said, there was 10 million dollar limits.

6 Well as Your Honor said, everybody's sort of
7 scratching their head and saying, well where did the 100.0
8 million dollars come from? There's no evidence to say to this
9 Court that that 100.0 million dollars was in fact a fair and
10 equitable settlement.

11 They're asking to tie that in, to have you say that
12 it was, by saying that by giving the five and a half million,
13 or 5.8 million to the excess policy, and giving the releases
14 for the proof of claim, and getting an indemnification --
15 waiving indemnification claims partially, because the estate --
16 the trust has to use its first 5.8 million dollars to indemnify
17 Royal for any claims made against it, by actually defending the
18 channeling injunction up to the first 5.8 million dollars of
19 stuff against them.

20 So then, but there's no proof here that shows that in
21 1995 a 100.0 million dollars was a fair and equitable
22 settlement for the policies.

23 THE COURT: Actually, I have the affidavits that
24 indicate that they were fairly negotiated, that that was the
25 was the parties' intent to settle all the policy limits and

Casey - Argument

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1 that in the opinion of the people who entered into the
2 settlement, that it was a good deal. What I don't have, is any
3 evidence to the contrary.

4 MR. SCHIAVONI: Your Honor, I also object that this
5 is not an argument that's stated in BNSF's late filed
6 objection.

7 They assert that they have a --

8 THE COURT: Mr. Schiavoni, if you're speaking, you
9 need to use a microphone. Go ahead, ma'am.

10 MR. COHN: Your Honor, the only affidavit that I have
11 seen is the affidavit that says that the 10 million dollar
12 excess policy could be fairly compromised for the 5.8 million
13 dollars.

14 If there are --

15 THE COURT: I'm sorry, there's -- I'm sure there's a
16 declaration, but I can't tell you who, that raises the question
17 of why Arrowood would have settled for a 100.0 million dollars
18 if it was only the products coverage.

19 There is some -- I apologize, I know I read it. I
20 just don't know whose declaration or affidavit it is.

21 UNIDENTIFIED SPEAKER: Arrowood.

22 THE COURT: Mr. Schiavoni's.

23 (Pause)

24 MS. CASEY: I apparently haven't received that, so I
25 haven't been able to look at that.

Cohn - Argument

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1 THE COURT: I can't -- in taking a look at the
2 policy, the 1995 -- what the parties were attempting to settle
3 with the 10 million dollar coverage, it's a little difficult to
4 see how 100.0 million dollars in 1995, we are talking 15 years
5 ago, 100.0 million dollars, I don't know what the present value
6 of that amount would be, but I'm sure that it would be worth
7 significantly more in today's dollars than it was in 1995.

8 It's difficult to see how that isn't a fair
9 settlement on the face of what the parties are propounding the
10 settlement to be on the face of the settlement agreement.

11 MS. CASEY: Okay. And understanding, Your Honor,
12 that you're not determining any of the 524(g) issues today --

13 THE COURT: I'm not.

14 MS. CASEY: -- then I have nothing further.

15 THE COURT: Mr. Cohn?

16 MR. COHN: Your Honor, the rights of the Libby
17 claimants under this coverage -- let me step back. The -- when
18 you adjudicate matters of property rights, those rights are
19 determined under state law. That's obviously a fundamental
20 principle that we all work on -- work through here in
21 bankruptcy.

22 And the rights of the Libby claimants with respect to
23 coverage under these policies, and everybody in this room will
24 acknowledge this, are triggered by the injury and the exposure.
25 Otherwise, why would we be talking about --

Cohn - Argument

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1 THE COURT: Well it's triggered by the injury and the
2 exposure in the period of time it's covered by the policy.

3 MR. COHN: Yes.

4 THE COURT: It's not that much of a foregone
5 conclusion. And Mr. Bernick's correct, that was 15 years ago,
6 and Mr. Schiavoni correct that they were on policies that were
7 issued a substantially long period of time ago, I think he said
8 50 years, I -- if you're looking at a 1995 settlement of
9 policies, it was clearly before then. And I think the policies
10 were for periods that began in the fifties.

11 MR. COHN: That's correct, Your Honor.

12 THE COURT: Okay. So if none of the claims were
13 asserted at the time, and no one is here actually asserting
14 that they had a claim under that policy now, I'm being asked
15 hypothetically to determine that there is such a person.

16 But I don't have any evidence that there is such a
17 person.

18 MR. COHN: Well, Your Honor, we have certainly
19 alleged that.

20 THE COURT: But allegations don't suffice to show me
21 why this settlement is not fair and equitable.

22 MR. COHN: Well, Your Honor, we'd be happy to offer
23 proof of that, because in fact it's --

24 THE COURT: But the time to do it was with -- in
25 objection to the settlement.

Cohn - Argument

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1 MR. COHN: Well, Your Honor, in fact, one of the
2 issues that we're going to deal with a little later in this
3 hearing is the whole issue of what --

4 THE COURT: Only if we get there.

5 MR. COHN: Is the whole issue of what would be a way,
6 in terms of don't consume horrendous amounts of this Court's
7 time, for us to prove people's rights under these insurance
8 policies.

9 And we've actually been trying and for, you know, to
10 work on that by stipulation with the parties, have not
11 succeeded. And I'm just telling you that really what you're in
12 effect inviting us to do and requiring us to do, is to reduce
13 claimants to say, you know, put on the stand and say, I was
14 exposed in such and such a year, and I have coverage under this
15 policy.

16 And that's -- we've been trying to avoid doing that,
17 under circumstances where we didn't need to.

18 THE COURT: But I don't even have an affidavit that
19 says that, as counsel you know that there are those claimants,
20 without identifying who they are.

21 I have no evidence.

22 MR. COHN: As counsel, we know. Your Honor, you've
23 been accepting representations from other lawyers here, accept
24 that one. We have clients who --

25 MR. BERNICK: Can we make a process suggestion?

Cohn - Argument

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1 I think that going down this road will create a mini coverage
2 issue.

3 THE COURT: It will. And I'm not going there.

4 MR. BERNICK: Right. We've got a legal issue about
5 whether if Mr. Lockwood -- any others -- if you don't have a
6 claim at the time settlement takes place, then to say that an
7 incipient claim, not even known, not even knowable, means that
8 you can't settle as of a given date, that's a legal -- I'm
9 sorry, that's a legal issue that I think Your Honor could
10 resolve.

11 I think that, with all due respect to Mr. Cohn, if he
12 wants to -- the whole matter's now before Your Honor, it's been
13 argued. If there's something else that he wants to proffer
14 before the Court, we would object it not being timely, but I
15 think that Your Honor's in a position where we now have taken
16 up the bulk of our time this morning, given -- to good use, but
17 we really have a lot of other matters to take up --

18 THE COURT: Mr. -- go ahead.

19 MR. COHN: Your Honor, from a process perspective,
20 Your Honor, I actually -- I agree that what -- that what was
21 argued was an issue of law, and I would ask, for that purpose,
22 that it be -- that you accept the representation that there are
23 such people out there who would qualify, if we can leap the
24 legal hurdles that Mr. Bernick has argued.

25 But to turn around and say that, even though it's

Ruling

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1 really not something that could fairly be disputed, you know,
2 either there are -- there about 950 of these Libby claimants,
3 and they have claims resulting from all different periods of
4 time.

5 And, yes, Your Honor, some of them do go back to the
6 1950's. And to rule against us on the basis that some -- that
7 these claimants don't exist who would have these rights, Your
8 Honor that --

9 THE COURT: That's not the basis, Mr. Cohn. That's
10 not the point.

11 MR. COHN: Then that's fine, Your Honor, if I'm to be
12 ruled against on an issue of law, I would say, Your Honor, that
13 I don't think anybody has -- well they've come up with theories
14 and they've come up with parades of horrible's about what it is
15 that would happen if you recognized the vested rights argument.

16 The problem is, they have not come up with any law to
17 the contrary. The law is as it was stated in our brief. And
18 I'll rest on that, Your Honor.

19 THE COURT: Okay.

20 MR. COHN: Although I'm happy to answer any
21 questions.

22 THE COURT: I don't have any. I've read the papers,
23 I've read the submissions of the parties. It seems to me that
24 the original discovery requests were really an effort to figure
25 out an interpretation of the 1995 settlement agreement, on the

Ruling

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1 theory that the settlement agreement is not clear on its face.

2 I can't support that discovery request, because I
3 think the 1995 settlement agreement is clear on its face. It
4 is an effort by the parties, and it is supported by the
5 declarations and affidavits, and I think deposition testimony,
6 but the -- whatever was submitted, I apologize, I read a lot of
7 stuff in a hurry, and I don't remember item-by-item which came
8 in by way of deposition, or affidavit, or declaration.

9 But there is supporting factual matter on the record
10 with respect to this item that indicates that the intent of the
11 parties was to settle, both the products and the non-products.
12 And I think the agreement itself is clear, so, frankly, I don't
13 even think their intent, at this point, evidence of their
14 intent would come into the record, because it's clear.

15 To the extent that the agreement is not clear, there
16 is the supporting evidence that indicates that was the intent
17 of the parties to negotiate a deal. So I don't see the need
18 for discovery on that issue. To the extent that this vested
19 rights argument is that the Libby claimants could not -- let me
20 state it a different way.

21 That the debtors could not have settled the policies
22 out from under the Libby claimants, surely they would have to
23 know who the Libby claimants were who were contending that they
24 had vested rights, in order not to make that settlement.

25 I think everybody's argument that indicates that the

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1 beneficiary of the policy, or the insured, pardon me, under the
2 policy can't settle its own policies, and then figure out how
3 to deal with who would have been the beneficiaries in another
4 context, is not correct.

5 The insurance stands for the insured. Yes, it is
6 there for beneficiaries in that it gives certain entities a
7 right to pursue insurance coverage, but the insured is the
8 debtor.

9 The debtor's the one who determines whether or not to
10 continue that insurance, not the beneficiaries under that
11 policy.

12 To the extent that there may be vested rights, maybe
13 there are. I don't have any way of knowing that there are or
14 are not. But I don't think that's the basis for this
15 determination.

16 I'm not aware of, but for a very, I think, odd on its
17 facts case that was cited, any indication by courts that say
18 that the insured's are not permitted to settle policies with
19 the insurance companies.

20 I'm just simply not aware of it, and I can't
21 understand how that could be the case, after all, they're the
22 contracting parties.

23 So if they want to settle their own liability, it
24 seems to me they've got the right to do that. Particularly in
25 a bankruptcy case, where the proceeds of those policies are

Ruling

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1 property of the estate.

2 To the extent that BNSF is contending that it is an
3 additional insured, I cannot see that it's an additional
4 insured. Not only does the August 1955 letter indicate to the
5 contrary, but in addition, the policy itself indicates to the
6 contrary. The additional insurance that the debtor purchased
7 was for the benefit of the debtor, to the extent that it ever
8 faced a contractual obligation to BNSF.

9 And it was not for BNSF's direct coverage.

10 So I don't see the basis for discovery. I don't see
11 a basis to hold up a determination of the settlement on the
12 merits today. It appears to me that, on the merits, the debtor
13 has exercised its best business judgment for the benefit of
14 this estate in settling this policy.

15 Part of my analysis is the fact that Arrowood is in
16 runoff, and that is a significant issue for collectibility in
17 the future.

18 These are high -- the two policies specifically at
19 issue are very high excess coverage policies, and it's possible
20 that by the time they were ever accessed, Arrowood would not be
21 around, nor have a successor at that time available to pay the
22 liabilities, in any event.

23 To the extent that the settlement incorporates this
24 release for the 1995 obligations, the record stands for the
25 proposition that there has been adequate consideration and

Ruling

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1 bargained for value in exchange.

2 It is a package deal. I'm not in anyway going to try
3 to bifurcate out the components of that package. So I see no
4 need for discovery. I see no basis on which to deny the motion
5 to approve the settlement.

6 However, I am not predetermining the 524(g)
7 injunction issues. So I would like an order that makes it
8 clear that I understand that the obligation is of the plan
9 proponents to pursue 524(g) relief for the Royal parties. But
10 I am not predetermining that issue. It's reserved for plan
11 confirmation.

12 Have I covered everything, by way of the objections
13 and motion to approve?

14 MR. COHN: Yes, Your Honor. Not exactly to our
15 satisfaction, but you've certainly covered it.

16 THE COURT: Okay. I just wanted to make sure I
17 haven't missed anything. Because it's been a couple of hours
18 worth of argument, and I just wanted to be sure that I covered
19 all the points.

20 MR. BERNICK: I know Your Honor's going to want to
21 take a break, and we're still with the 1:30 is the --

22 THE COURT: Yes.

23 MR. BERNICK: Okay. So we have if we --

24 THE COURT: Actually I thought it was 1:15. But --

25 MR. BERNICK: We'll do 1:30 --

Ruling

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1 THE COURT: Yours truly, has to be outside at 1:30.
2 I'll see if I can get that changed to --

3 MR. BERNICK: That would be terrific.

4 THE COURT: -- a little later. But I can't guarantee
5 it.

6 MR. BERNICK: Well I understand that. As I look at
7 it, and I don't mean to introduce a whole another subject for
8 discussion before we take the break, but as the debtor, with
9 some degree of at least influence over the order of
10 proceedings, there are four discrete substantive matters that
11 still need to be addressed.

12 There's the -- and the need for having them be
13 addressed, is that they bear directly on the course of
14 discovery going forward, and, therefore, the ability to adhere
15 to the schedule.

16 One is solvency. Another -- and then there are three
17 Libby issues that are fairly discrete issues, and I think that
18 two of them are already well-known to the Court, because
19 they've been the subject of , (a) prior rulings, or (b) prior
20 commentary by the Court.

21 And the last one is their motion to supplement their
22 objections. Those four matters, I think, can be heard about 20
23 minutes a pop. My hope is that we can do that. That then
24 leaves us with what we were supposed to talk about, which is
25 phase 2 pretrial order.

Colloquy

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1 I'll tell Your Honor that we have circulated a case
2 management order, and we did so last Friday. And the case
3 management order, and if anybody says they don't have copies or
4 whatever, we got copies here, people can look at them on the
5 break, whatever.

6 But it's basically a schedule going forward. It
7 leaves open the major issues that are part of the rest of the
8 agenda, so I think it's really other things that are not
9 controversial. It would great if people could look at it and
10 then we can talk, Your Honor. I think Your Honor would
11 probably like an overview on what looks like the evidence going
12 forward and how the trial would work.

13 We have a proposal for how the trial would work, and
14 we have a proposed CMO to get us to trial.

15 I'm not sure that we can get those matters resolved
16 today, due to the shortness of time. But also because people
17 need to have the opportunity to look at this and digest it.
18 Maybe it would be appropriate to see if we can have a
19 telephonic call -- telephonic call somewhat redundant -- to
20 talk about both of those matters. But certainly the case
21 management order.

22 The case management order, because it doesn't deal
23 with the controversial matters, really is a question of, when
24 are everybody going to exchange exhibits, when are the motions
25 in limine going to be filed, when are Daubert -- and then the

Colloquy

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1 designations and counter designations.

2 So my hope is that it won't be too controversial.
3 That's really what it does. Our proposal, therefore, would be
4 to start right after the break with the remaining matters in
5 controversy. That is item 11, which is solvency; item 5, which
6 is Libby; 12 and 13, which are Libby.

7 Those are the four matters. And then finish up with
8 the pretrial order and report on the pretrial submissions.

9 THE COURT: All right. We'll take a 10 minute
10 recess.

11 (Recess)

12 THE COURT: Please be seated. Mr. Bernick, with
13 respect to a discussion by telephone concerning the case
14 management order and pretrial process, how about Thursday at
15 noon?

16 MR. BERNICK: That would be fine, from the debtor's
17 point of view.

18 THE COURT: I'll reserve two hours, that should give
19 you enough time to --

20 MR. FINCH: Your Honor, I'm going to be on an
21 airplane on Thursday at noon.

22 THE COURT: Anybody able to participate for you, Mr.
23 Finch?

24 MR. FINCH: Well I just asked -- and he seemed to
25 indicate otherwise.

Colloquy

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1 UNIDENTIFIED SPEAKER: Well, okay. I got to get my
2 instructions in advance, though, Your Honor.

3 THE COURT: All right. Thursday at noon. By phone.

4 UNIDENTIFIED SPEAKER: Your Honor, we're probably
5 going to need some special court call arrangements to get that
6 in.

7 THE COURT: Can they get us a list that soon? Yes.
8 Wednesday by 4 to make the arrangements to participate through
9 Court call, is fine.

10 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

11 THE COURT: Okay, Mr. Bernick.

12 MR. BERNICK: We've had a discussion on the break
13 with respect to item 11. Item 11 is solvency. And the issue
14 that we've raised there, I think Your Honor probably has seen,
15 or may or may not have seen in the report that we filed -- the
16 status report that we filed concerning matters relating to the
17 default interest issue.

18 In a discussion with Mr. Pasquale and Mr. Cobb over
19 the break, which is, as usual, very productive. And -- it was.
20 So, they have a new -- they have an expert, I won't say new,
21 because they would object to that characterization.

22 They have an expert named Freza (phonetic), and Mr.
23 Freza is apparently is going to address the issue of solvency.
24 I've gotten an informal indication from counsel about exactly
25 what he's going to do.

Colloquy

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1 That informal indication has allayed some of my
2 concerns about whether we're going to get to the end of this
3 thing. And in light of it, they propose to have his expert
4 report in our hands a week from today.

5 Now that's a week, and weeks make a big difference,
6 at this point. But given the scope of what they described as
7 being his report, that's fine.

8 So we'll get an expert report from Mr. Freza next
9 Monday. At that point, obviously, we're going to need to
10 respond. And we have Ms. Zilly (phonetic) who is going to be
11 testifying for the debtor's on solvency, and any supplement
12 that she'll do, we'll produce within a week.

13 To the extent, then, that we have to proceed with
14 depositions, there are depositions that have to be taken. And
15 I think that then it really is up to us to figure out a
16 deadline for the commencement and completion of those
17 depositions.

18 And rather than try to haggle that out now with the
19 Court and take up more time today, we're happy to have a
20 discussion with Mr. Pasquale and Mr. Cobb concerning the
21 completion of the remaining depositions that will effect the
22 solvency issue.

23 So I think that's where we are on item 11.

24 THE COURT: All right. Well then, if that's the
25 case, why don't I expect that you're going to submit on a

Colloquy

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1 certification of counsel whatever you've agreed to?

2 If you haven't agreed, just put it on Thursday's
3 agenda at noon.

4 MR. BERNICK: That's what I would think.

5 MR. PASQUALE: Your Honor, that process -- Ken
6 Pasquale for the unsecured creditors committee. The process
7 sounds fine. I would note that, in the debtor's various
8 submissions there are -- we have one witness, one on affidavit,
9 one live.

10 Debtors have 6 or 7. So it's a two-way street, we'll
11 need to discuss deposition dates for all of those witnesses.

12 So I just want to be clear on that, for the record.

13 Thank you.

14 THE COURT: Okay. But I think you ought to be able
15 to work that out.

16 MR. PASQUALE: I sure hope so, Your Honor.

17 THE COURT: Is Thursday by noon -- at noon
18 sufficient, if you can't for some reason?

19 MR. PASQUALE: No reason we shouldn't be able to work
20 that out by then.

21 THE COURT: All right.

22 MR. MARTIN: Your Honor, Craig Martin, for the
23 record, for Morgan Stanley senior funding. I just rose,
24 because item 11 touches on impairment issues.

25 And I just wanted to remind the Court that we

Colloquy

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1 participated in the prior proceedings on impairment. And to
2 the extent that they're ongoing issues related to impairment,
3 we would like to be included in that.

4 I discussed this with Mr. Bear (phonetic), I don't
5 think it's an issue, but I just wanted to make the Court aware
6 of that.

7 THE COURT: Can you live with the same deadlines?

8 MR. MARTIN: Well this is really --

9 THE COURT: I mean, on the solvency issue?

10 MR. BERNICK: Your Honor, on the solvency issue --

11 THE COURT: Yes.

12 MR. MARTIN: -- to the extent we've been
13 participating, we've been coordinating with the committee, so
14 the deadlines that have been stated, I have no issue with
15 those.

16 THE COURT: All right.

17 MR. MARTIN: I just wanted to remind Your Honor that
18 we were lurking around on these issues.

19 THE COURT: All right.

20 MR. BERNICK: We've noticed the lurking. The
21 lurking, though, I think has been on item 10, which is a status
22 report on impairment, and we didn't mean to pass over that
23 issue. In fact, we'll be coming back to that, because Mr.
24 Lockwood has a very lengthy and scholarly report to make with
25 respect to impairment.

Bernick - Argument

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1 We'll come back to item 10.

2 MR. LOCKWOOD: Not true, Your Honor. One minute.

3 MR. BERNICK: We'll come back to 10, and talk about
4 impairment, and also where things stand on other phase 1, which
5 is insurers. so I don't mean to skip over that, I'm just
6 trying to get to the finish line here.

7 UNIDENTIFIED SPEAKER: You mean, insurance neutrality
8 not --

9 MR. BERNICK: No impairment, and insurance
10 neutrality.

11 UNIDENTIFIED SPEAKER: Oh, okay.

12 MR. BERNICK: Phase 1. Okay. So that then takes us
13 to --

14 THE COURT: Mr. Bernick, excuse me one second.

15 MR. BERNICK: Yeah, I'm sorry.

16 (Pause)

17 THE COURT: Okay, Mr. Bernick, I'm sorry. I
18 neglected to see whether I could get a later car. So I'm going
19 to try that now.

20 MR. BERNICK: Okay. Well on the basis of that prompt
21 resolution, we now go with optimism, that the same thing will
22 happen on the next three, although, I'm not sure.

23 So item 5 relates to the motion for reconsideration
24 with respect to -- the motion for reconsideration with respect
25 to the medical files that should be produced in connection with

1 the testimony of Dr. Whitehouse (phonetic).

2 Your Honor will recall that Your Honor issued an
3 order on this subject, directing that any and all files that
4 were part of the materials that Mr. -- Dr. Whitehouse relied
5 upon, needed to be produced.

6 That extended, under the record then stood at 1,800
7 files. And Your Honor entered an order. There's now a motion
8 for reconsideration.

9 And I want to put this a little bit in context,
10 without spending too much time on it. So that we can come back
11 to this later in connection with item 12, I believe that it is.

12 But effectively, we're talking about two basic kinds
13 of evidence. There is epidemiological evidence, which relates
14 to groups. Then there's evidence relating to individual
15 diagnosis. And there's clearly a distinction between these two
16 different kinds of evidence.

17 Your Honor has well recognized that distinction in
18 addressing this in connection with the prior order. And as
19 you'll hear in just a moment Judge Molloy also addressed this
20 distinction specifically in dealing with Dr. Whitehouse.

21 There's no question but that the objection that's
22 been raised by the Libby claimants implicates what happens with
23 respect to groups, that is epidemiology. And I say that
24 because, the position that's being taken by the Libby claimants
25 insofar as the plan is concerned, centrally focuses on the

1 question that they address, which is, are the Libby claimants
2 different, such that the treatment of the Libby claims in the
3 plan is unequal and discriminatory?

4 That is fundamentally a group issue. The plan deals
5 with groups of claimants. We don't resolve claims, claim-by-
6 claim, or we don't address claims or treat claims in the plan
7 by saying, claimant number one, here's the treatment.

8 It is a group. And because it's a group, it poses a
9 fundamental question that epidemiologist answer, which is, well
10 as a group are they different.

11 There's also no question but that, as Dr. Whitehouse
12 has proceeded in this case as a witness, that this is the kind
13 of role that he has sought to play.

14 He has not simply come in as talking about individual
15 diagnoses, he's produced expert reports. Indeed, multiple,
16 multiple expert reports. He has testified that the basis for
17 his expert work, in part, there's a whole group of people,
18 there's been 1,800 people in the Card plaintiff.

19 And the opinions that he has offered, are opinions
20 that are broad opinions that go to the group of claimants as a
21 whole. So when it comes to the question of what Dr. Whitehouse
22 has done, he has purported to address these fundamental issues
23 that epidemiologist's look at.

24 He's not the only one. They have an epidemiologist,
25 a Dr. Moolgauker. And Dr. Moolgauker also has addressed this

1 issue. And they have another expert, Dr. Frank. And Dr. Frank
2 also has addressed this issue.

3 But what brings us here is an order with respect to
4 Dr. Whitehouse, and Dr. Whitehouse most certainly has acted as
5 an expert in addressing these issues of what happens with
6 respect to a group of people.

7 Now we don't believe that, at the end of the day,
8 that Dr. Whitehouse is going to be even remotely qualified to
9 do what he purports to do. And, in fact, we have here an order
10 that was filed on April 21st in the criminal case, because we
11 sought to strike Dr. Whitehouse's testimony in the criminal
12 case, on the grounds that -- and I'm going to disappoint Mr.
13 Schiavoni in here -- "Dr. Whitehouse is qualified to give
14 expert opinions as a physician specializing in pulmonary
15 disease. His area of expertise is specific causation, not
16 general causation. Dr. Whitehouse lacks the specialized
17 knowledge and training necessary to render an epidemiological
18 opinion, which creates the concern that his opinion testimony
19 was not based on a valid scientific methodology. That concern
20 was confirmed on cross-examination, where Dr. Whitehouse
21 conceded that his opinion was the product, not of valid
22 science, but rather of his own subjective assessment."

23 And then the cross then follows.

24 So Dr. Whitehouse sought to express these broad
25 opinions in Minnesota, and was -- he did so initially, and then

1 the jury was instructed to disregard his testimony, because he
2 wasn't qualified to render that kind of opinion.

3 We believe that that kind of motion is appropriate
4 here. It will be made. We believe that ultimately Dr.
5 Whitehouse will not be permitted, should not be permitted to
6 testify.

7 But that is not the issue that brings us here today.
8 The issue that brings us here today is the production of
9 documents that need to be available in the event that he is to
10 be proffered as a witness on this subject.

11 And the -- Your Honor has addressed that. Your Honor
12 addressed it in the form of an order. That order was entered.
13 And that order was clearly based upon a sound and accurate
14 assessment of both the law and the facts.

15 Rule 26 clearly does apply to his expert opinions, to
16 the extent that they go beyond what they would be as a treating
17 physician, that is, individual diagnosis. The fact that he's a
18 treating physician does enable him then to avoid the disclosure
19 requirements of Rule 26 when he goes beyond talking about
20 individual patients, and talks about a broader proposition.

21 The issue is fundamentally whether Rule 26 needs to
22 be followed, or he expresses such broad opinions. It clearly
23 does, and we're entitled to get the information.

24 That was the state of the record before. It remains
25 the state of the record today. There is nothing new. The

Lewis - Argument

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1 motion for reconsideration should be denied.

2 And this is of critical importance here, because
3 we're talking about -- we've already deposed the guy and we're
4 talking about a very substantial volume of additional
5 information that would be relevant to the cross-examination of
6 this witness.

7 So we don't believe that the motion for
8 reconsideration is well taken. I know that I've essentially
9 argued my opposition, but I felt that I would expedite the
10 matter.

11 THE COURT: All right. Mr. Cohn?

12 MR. LEWIS: Your Honor, I'm Tom Lewis, I'll be
13 arguing this motion.

14 THE COURT: All right. Mr. Lewis.

15 MR. LEWIS: I have the dubious distinction of
16 appearing before this Court for the first time to argue a
17 motion that's already been lost.

18 I'll do the best that I can to be brief. I would
19 also point out that we now know that even Mr. Bernick makes
20 mistakes. Because he just represented to the Court that the
21 criminal trial that he was talking about occurred in Minnesota.

22 It actually occurred in Missoula, Montana.

23 MR. BERNICK: Absolutely right. And I'll never
24 forget it.

25 MR. LEWIS: It was meant to be a little bit of humor.

Lewis - Argument

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1 I'll get off the humor. Which I'm not very good at. First of
2 all, I think what Mr. Bernick has done here, is pointed the
3 Court to epidemiology, which is, they're hard on it, they think
4 that this doctor is -- will not be qualified to testify, based
5 primarily on admissions that he made in the criminal trial, and
6 Judge Molloy's ruling.

7 I would point out to the Court that that was the only
8 portion of his trial testimony that was stricken, and he was on
9 the stand for four and a half hours. And that was a very small
10 part of his overall testimony.

11 So he will be testifying in this case, as he did in
12 the criminal case, as a treating physician.

13 With respect to treating physicians, under Rule 26,
14 treating physicians are not required to file a report. It's
15 only when he gets in the area of his various studies that he
16 needs to file a complete report.

17 And he has filed a report, we have a change in his
18 report. We filed a modification, or an amendment to the
19 report, in which he indicates he'll only be relying on his
20 experience with the 850 or 950 --

21 THE COURT: Well how is he going to subtract that
22 out? I mean, if his studies were all based on 1,800 people,
23 how does he suddenly say, I'm taking half of the population
24 out, and my opinions stay the same, because I'm no longer going
25 to rely on those?

Lewis - Argument

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1 MR. LEWIS: Okay.

2 THE COURT: I mean, as a treating physician, fine, to
3 the extent that's relevant, and I'm not ruling on relevance, I
4 think he can testify as a treating physician. But that doesn't
5 permit him to get into epidemiological issues. And that's the
6 problem.

7 And all I thought I was addressing in the prior
8 order, was the his ability to testify and from what documents,
9 as an expert in the epidemiology area, and not in the treating
10 physician area.

11 And no one had even raised that issue with me.

12 MR. LEWIS: Well I'm responding to Mr. Bernick's
13 comments on epidemiology, which I think should be left for a
14 later day, in terms of the Daubert motions in this thing. What
15 I'm trying to say to you, Your Honor, is that, like most of the
16 physicians who will testify in this case, Dr. Whitehouse cannot
17 separate all of his prior clinical experience from the
18 testimony that he will give concerning his reports as filed
19 with the Court.

20 He can give opinion testimony based upon the 950
21 Libby clients, who are Libby claimants who have filed claims in
22 this case.

23 The difficulty here, in this case -- with the order,
24 was two-fold, in our view. First of all, it did not address
25 the physician testimony and the treating physician testimony.

Lewis - Argument

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1 THE COURT: That's because no one objected to it. I
2 wasn't addressing it, because nobody raised it.

3 MR. LEWIS: And secondly, it ruled that his testimony
4 would not be allowed, unless he could produce, within one week,
5 the other 850 non-claimant patient's records.

6 THE COURT: That he -- any records he relied on, I
7 think was the issue.

8 MR. LEWIS: The difficulty with the order, in our
9 opinion, is that the Court by its order required him to perform
10 a practical impossibility.

11 THE COURT: Well he was already outside the time to
12 produce the documents that attached his expert report. I was
13 giving him some additional time.

14 MR. LEWIS: Well we filed affidavits from the two
15 repositories of records in Libby. One of them was St. Johns
16 Lutheran Hospital. The other was the Card Clinic (phonetic).
17 Both of them indicate that Dr. Whitehouse does not have
18 unfettered ability to produce those records.

19 THE COURT: They've been filed in connection with
20 this motion. They were not filed in connection with the
21 original motion.

22 MR. LEWIS: Yes. That is true, Your Honor. We are
23 submitting that as new evidence, as to the difficulty in
24 complying with the order of the Court, and the inability --

25 THE COURT: How is that new evidence? Dr. Whitehouse

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1 knew what he had access to and didn't have access to before.

2 MR. LEWIS: But Dr. Whitehouse did not have the power
3 to produce those records, Your Honor.

4 THE COURT: Well then he didn't have any ability to
5 rely on them. If he's going to be called as an expert to
6 testify at trial, the rules are very clear. That the evidence
7 that the expert relies on has to be producible. If he couldn't
8 produce it, he shouldn't have been using it.

9 I mean, he's creating his own problems.

10 MR. LEWIS: He has produced -- let's talk about what
11 he has produced. He's produced all records relating to his
12 2004 peer reviewed study. He's produced all records relating
13 to his 2008 peer reviewed study.

14 He's also produced all of the records of those
15 individuals included in his mortality study. The difficulty
16 for him was, we had no way of knowing, and he had no way of
17 knowing, that he was going to have to provide records of those
18 individuals he treated, but who were not claimants in this
19 case.

20 THE COURT: Certainly he knew. Or his counsel knew.
21 Those are the requirements of the Federal Rules. If you
22 designate someone as an expert, that's the requirement of the
23 Federal Rule. That argument simply doesn't hold any water.

24 MR. LEWIS: Well the result of the Court's order, is
25 to strike his testimony as to virtually everything, other than

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1 his treating physician testimony, and I assume the studies, if
2 they qualify as proper under Daubert challenge, for which he's
3 provided the records.

4 The difficulty for us is that, the order seems to say
5 that any testimony he may offer that relies in whole or in
6 part --

7 THE COURT: It does say that.

8 MR. LEWIS: That's a -- we believe that's over the
9 top, because of the fact that every physician who will testify
10 in this case will be relying on all of their training and
11 experience. And in fact that's the foundation you lay, and
12 perhaps with every witness you put on as an expert.

13 THE COURT: Well, the clarification that you may
14 need, is that I wasn't asked to address and wasn't addressing
15 any testimony that he may be offering as a fact witness as a
16 treating physician.

17 That wasn't the intent of the order. The objection I
18 had was to strike his expert reports, based on the -- and not
19 permit any testimony based on them, because he hadn't produced
20 all the underlying documentation.

21 That's the only issue I was -- I asked to address and
22 that's the only issue I did address. So if you need
23 clarification on that score, I'm happy to provide it. To the
24 extent he's being called as a fact witness, he obviously hasn't
25 produced an expert report, he doesn't need to produce an expert

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1 report, and that order doesn't bar his testimony as a fact
2 witness.

3 And I'm happy to put that in writing, if that's
4 necessary. You can submit an order to that effect.

5 MR. BERNICK: We would, and I'll also state, we don't
6 have a problem with that proposit -- we don't know -- we don't
7 know that the treating physician testimony is germane to an
8 issue in the case, but on the basis of the prior order, we're
9 not arguing the prior order prevents him from testifying to --
10 as a treating physician for something that he did with an
11 individual.

12 THE COURT: Okay.

13 MR. LEWIS: That's disposed of. But we think the
14 Court should reconsider its ruling and allow him to testify
15 based upon his experience with the claimants. He has -- he had
16 no power to get their records, we had no power to get their
17 records until there was an order of this Court.

18 They're not parties --

19 THE COURT: But you never asked for an order.

20 MR. LEWIS: Pardon me?

21 THE COURT: You never asked for an order. You
22 certainly could have approached the Court to say, we're calling
23 this guy as an expert witness for trial. He needs to produce
24 records. We don't have the ability to get them, absent a Court
25 order.

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1 I never heard a word about any of this, until there
2 was an objection, because he hadn't produced the records, and
3 the rules require him to produce the records. I don't see how
4 you get out of the Rule.

5 The Rule says you produce the records. That's the
6 Rule. That's not this Court's rule. That's the Federal Rules.
7 And to the extent that he --

8 MR. LEWIS: Well we respectfully disagree. We
9 believe that, to the extent that the Court has required him to
10 get records that he does not have access to, the Court can't
11 require practical impossibility from this --

12 THE COURT: But he had access to them. You can't, on
13 the one hand tell me he relied on them for purposes of issuing
14 his opinion, and on the other hand say he has no access to
15 them.

16 MR. LEWIS: He can reach them, because he is a
17 treating physician. He doesn't own the records at St. Johns
18 Lutheran, he doesn't own the records at Card. We've got
19 affidavits that say he cannot produce those.

20 THE COURT: He is accessing records for people he
21 didn't treat?

22 MR. LEWIS: No, these are all people the treated,
23 Your Honor.

24 THE COURT: But who are not claimants here.

25 MR. LEWIS: Who are not claimants.

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1 THE COURT: Then he could have approached his own
2 patients and said, I have need to disclose these records for a
3 limited context, may I?

4 MR. LEWIS: You're talking about 850 --

5 THE COURT: Well it's his report, not mine.

6 MR. LEWIS: That's no easy --

7 THE COURT: He's the one who relied on the 1,800
8 people for the basis for his report.

9 MR. LEWIS: The effect is to strike testimony, that
10 is the heart of our case against -- in these confirmation
11 proceedings.

12 THE COURT: I don't see a way around it. He's
13 required to produce the evidence. And to say that he can now
14 somehow or other bifurcate in his mind the 850 people from the
15 950 and that everything he's already written based on 1,800 --
16 a sample of 1,800, is going to be the same, based on a sample
17 of 950, I don't --

18 MR. LEWIS: Well there will be applied -- in the same
19 manner to the other witnesses who have not provided --

20 THE COURT: The backup documents?

21 MR. LEWIS: The backup documents for their --

22 THE COURT: Yes.

23 MR. LEWIS: -- clinical history?

24 THE COURT: Yes.

25 MR. LEWIS: I disagree with the Court. I don't see

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1 why this physician cannot testify that he can separate out his
2 experience with the 950 that are claimants in this case, and
3 not rely on the experience with the 850 who are not claimants
4 in this case.

5 THE COURT: Well, first of all, the records haven't
6 been produced. And so, to the extent that someone wants to
7 cross-examine him about that fact, how can they, when the
8 evidence hasn't been produced?

9 It's the same problem, only stated from the reverse,
10 you know, from the flip-side of the coin. The evidence still
11 has to be produced, whether it's to support his testimony, or
12 to support the fact that he can testify without having relied
13 on the information he first said he relied on.

14 I just don't see a way around the production
15 requirement.

16 MR. LEWIS: Thank you, Your Honor.

17 (Tape Change)
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Bernick - Argument

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1 THE COURT: I need -- I will need an order. Is the debtor
2 going to prepare these in -- in conjunction with --

3 MR. BERNICK: Yes. Yes.

4 THE COURT: -- opposing counsel? Okay. Thank you.

5 MR. BERNICK: And -- and we'll make sure to clarify
6 that -- that the prior order did not address testimony --
7 factual testimony of Dr. Whitehouse as a treating physician, to
8 the extent that it's relevant.

9 THE COURT: Okay. That -- that would be
10 fine --

11 MR. BERNICK: Yeah.

12 THE COURT: -- because I did not intend to make
13 that --

14 MR. BERNICK: -- Yeah. And I --

15 THE COURT: -- part of the order.

16 MR. BERNICK: And I do appreciate Mr. Lewis's
17 position. It's a very difficult one. And I know from the
18 experience of taking Dr. Whitehouse's deposition, which Mr.
19 Lewis defended -- he's a very capable and -- and honorable
20 lawyer -- is just -- well, enough said. Your Honor, we'd then
21 like to turn to item 12 on the agenda. Maybe we won't need
22 that Thursday time after all. I won't say that.

23 Item 12 on the agenda deals with the question of --
24 of testimony from individual claimants from Libby. And the
25 very, very brief history on this, Your Honor, because this is a

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1 motion -- this is a motion to -- to determine -- to basically
2 have the Court confirm what -- what came up last time -- I
3 guess this was back in May -- that the testimony of individual
4 Libby claimants on medical issues would not be appropriate.
5 But let me just give a very short history.

6 THE COURT: Well, Mr. Bernick --

7 MR. BERNICK: Sure.

8 THE COURT: -- I don't understand what issue is going
9 to come up on which individual claimants are going to testify.
10 This is not covered litigation. To the extent that there is
11 something relevant about the nature of the plant or the
12 conditions under which they work, frankly, I -- right now,
13 sitting here right now, I can't see that relevance. But if
14 there is some relevance, I think they can testify about that
15 fact. But I am hard-pressed to see what relevance there is to
16 any issues that will affect confirmation.

17 MR. BERNICK: Okay. Well --

18 THE COURT: So I think I need to hear from Mr.
19 Cohn --

20 MR. BERNICK: That's fine.

21 THE COURT: -- on this one. And -- and I'm cutting
22 off the history because I'm aware of the history. I don't need
23 a recitation of it.

24 MR. BERNICK: That's fine.

25 MR. COHN: Your Honor, there are four -- there are

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1 four issues on which -- or four types of issues, I should say,
2 on which we would assert that individual testimony may be
3 needed. One of them is -- is medical condition. And it is --
4 it is true that that was the subject of this Court's ruling in
5 connection with deposition testimony. And what you said then
6 similarly, by the way, to what you just said now, is that. But
7 I don't know what might come up at trial, and -- and so you are
8 not ruling on the issue of whether individuals could testify
9 about medical issues at trial.

10 And with this motion -- one of the things this motion
11 attempts to do is to -- is to obtain that ruling from you. And
12 I want to say that we would -- and that raises two issues,
13 really. One is -- one is, you know, because of the reservation
14 of -- that you made at the earlier hearing, that you were not
15 ruling on trial issues, we absolutely needed to list these
16 witnesses on our witness list, because otherwise we're -- we're
17 waiving a right.

18 THE COURT: Mr. Cohn, to the extent they're
19 duplicative, I can assure you, you're not going to call 100
20 individual witnesses to basically tell me the conditions and
21 the problems that they're individually facing. That's what you
22 have Dr. Whitehouse for.

23 MR. COHN: Well, apparently we don't, Your Honor.

24 THE COURT: Well, you do as the treating physician.

25 MR. COHN: So -- so anyway, that's -- but that's part

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1 one. I just really wanted to make it clear that the reason
2 that these people are on the witness list, those -- those
3 individuals who are on the witness list with a view toward
4 testifying as to medical issues are on there because there was
5 -- it was expressly reserved in the record that -- that you
6 were not ruling upon whether they could testify at trial.

7 THE COURT: But --

8 MR. COHN: And we needed to preserve the record.

9 THE COURT: So pick four or five of them, because I
10 probably won't even hear that if -- that many if it's
11 cumulative. And designate who they are, and I'll permit those
12 depositions to go forward. I'm not ruling that they're
13 relevant. I doubt that they will be relevant based on other
14 confirmation hearings, but I don't want to foreclose the fact
15 that some relevant evidence may come up.

16 But I am not going to permit depositions of 100
17 people who will say that they -- you know, their conditions are
18 such that they can't walk up and down the steps. That's what
19 Dr. Whitehouse can say. He's the treating physician. And you
20 can probably bring in almost all, if not all, of this evidence
21 through him.

22 MR. COHN: Thank you, though, as to the four or five,
23 Your Honor.

24 Now, the second -- the second topic upon which --
25 upon which individual testimony will be needed -- and this

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1 accounts also for -- for some of the people who were on the --
2 on the witness list that we filed -- is to testify about pre-
3 Bankruptcy settlements. And the reason why that's important,
4 Your Honor, is because one of the contentions that we make is
5 that the value of these Libby claims in the tort system is much
6 higher than is required or even permitted to be -- to be
7 liquidated -- the liquidated amount of their claims under the
8 TDP.

9 THE COURT: Are these the two lawyers?

10 MR. COHN: No, I'm going to get to that.

11 THE COURT: Who are you --

12 MR. COHN: These are -- these are individual
13 claimants --

14 THE COURT: They're going to know that their
15 settlements were higher than what Grace litigated with other
16 individual people in the tort system?

17 MR. COHN: No. No, Your Honor.

18 THE COURT: Okay.

19 MR. COHN: No, this is -- this is testimony by -- by
20 the -- those whose cases were settled about their exposure and
21 their condition and so on, which will enable us -- it's just
22 one element of -- of the proof. The other element of which
23 will be, yes, and there are these other people out there who
24 are -- who are unsettled, who are in a similar position and
25 have a similar profile to these people who were settled.

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1 So the prepetition guy settled for \$400,000. But the
2 TDP would permit the same person -- or person with the same
3 profile -- only to settle for -- or sorry, only to have a claim
4 of at most, say, \$20,000.

5 THE COURT: And this evidence isn't available through
6 Grace's prepetition settlement history?

7 MR. COHN: The prepetition settlement history will
8 say the -- the person and the amount of the settlement. And in
9 fact, we have -- we are largely in agreement as to what the
10 prepetition settlement names and amounts were. But there are
11 other facts that are -- do not appear from that settlement
12 database. For example, was the person an employee or a spouse
13 or family member of an employee or a community member.

14 Another thing that doesn't appear is the period of
15 exposure. And those -- those are necessary to -- oh, and also
16 -- and also, for that matter, the medical condition. Those --
17 those facts are necessary in order to do a comparison. If we
18 simply said, Your Honor, yeah, there was some Libby claimant
19 out there who got a \$400,000 settlement pre-Bankruptcy and so,
20 therefore, all of our -- all of our claimants should get
21 \$400,000 settlements under the TDP, you'd laugh, because you'd
22 say, no, Mr. Cohn, I need --

23 THE COURT: This --

24 MR. COHN: -- I need apples to apples.

25 THE COURT: I do. I need it from an expert who's

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1 going to make this comparison and say this is the relevance of
2 this issue. This is -- this is the subject of expert
3 testimony. An individual plaintiff can't possibly tell me that
4 their settlement was higher than the settlement of another
5 individual plaintiff.

6 MR. COHN: No, they're not doing the comparison, Your
7 Honor. They're just -- they're just -- it's -- as with any
8 other case that you try, you have building blocks. And each
9 piece of evidence is a building block, because --

10 THE COURT: I'm not trying tort claims. I'm trying
11 whether or not --

12 MR. COHN: Well --

13 THE COURT: -- the plan is fair and equitable as to a
14 class. So an expert ought to be telling me whether the people
15 who are in that class are substantially either similar or not
16 similar or whatever the objection or the proponents are going
17 to say with respect to that. This isn't a matter for
18 individuals.

19 MR. COHN: Your Honor, with -- with respect, we -- we
20 assert that the way that we intend to -- to prove this is by
21 introducing the -- the claimants and their -- their testimony
22 about their -- their profile. And we also intend to -- through
23 the lawyers who -- Mr. Lewis and Mr. Heberling who represented
24 them -- to draw the -- the similarity to the profiles of the
25 Libby claimants who exist now, and who -- who ought to be

1 obtaining similar values under the TDP.

2 THE COURT: Okay. And why is that something that you
3 need the individual claimants for and not just the lawyers who
4 are going to make this comparison? Because to the extent that
5 they're going to be called as experts to make that comparison,
6 clearly the individual profiles is information that they could
7 consider in the course of making that decision. In fact, they
8 have to consider it to make that decision. So I'm at a loss as
9 to why I need the individual claimants to testify and why they
10 need to be produced for discovery.

11 MR. COHN: Because -- well, in order -- in order --
12 in order to complete the record and -- and to permit to -- to
13 establish what the underlying facts are about the pre-
14 Bankruptcy settlements in a way that someone can't simply come
15 along and say, well, you know, we disagree with the lawyer's
16 perspective on the case. I mean, you have a person testifying
17 to the actual facts.

18 MR. LAUGHLIN: (Phonetic) Isn't -- isn't the issue
19 what Grace knew about the claimants? Because Grace was the one
20 that entered into the settlement. The individual claimant,
21 unless he's going to testify about, I had personal settlement
22 negotiations with Grace, I mean, for all the record would show,
23 Grace wouldn't know half of the profile that the individual
24 claimant is proposing to testify about.

25 MR. COHN: And -- and the -- and that -- that part of

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1 the testimony will be established through the lawyers,
2 obviously, who conducted the settlement negotiations and,
3 therefore, who knew what information Grace had access to in the
4 context of negotiating he settlement.

5 MR. LAUGHLIN: But the other part of the testimony is
6 irrelevant. If Grace didn't know what their profile was, it
7 couldn't have taken it into account in entering into the
8 settlement.

9 THE COURT: I -- I just -- I'm at a loss to see how
10 the individual plaintiffs are going to either add or subtract
11 anything in this capacity. The experts, yes, I can understand
12 where you're going from the expert testimony. And if those --
13 if those are going to be the lawyers who negotiated the
14 settlement, fine. But I -- I'm missing where the individuals
15 are adding anything.

16 MR. LAUGHLIN: Your Honor, the deadline for expert --

17 MR. COHN: Well, I'm not sure -- yes, I --

18 THE COURT: Can't -- I can't hear you.

19 MR. COHN: The -- Your Honor, I -- I'm going to
20 disagree with the characterization of Lewis and Mr. Heberling
21 in that capacity as -- as experts. They're more analogous to
22 the treating physician in the sense that they're not --

23 THE COURT: Oh, the fact witnesses. All right.

24 MR. COHN: -- they're not -- well, they're not
25 sitting there -- they're not sitting there saying, you know, in

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1 the -- in the abstract, you know, here's -- we had nothing to
2 do with this in the past, but we're --

3 THE COURT: All right.

4 MR. COHN: Okay. So I just wanted to make that
5 clear, because I believe somebody was about to shout out from
6 the audience, the -- the deadline, you know, has passed for
7 expert testimony. And we did not think this was expert
8 testimony and have not proffered it as such.

9 THE COURT: All right.

10 MR. COHN: A third purpose, Your Honor, for which
11 Libby claimant individual testimony is being introduced is to
12 -- is in order to familiarize this Court with conditions at the
13 -- at the mine and at Grace's facilities in -- in Libby, which
14 we think is important for any fair consideration of the
15 position of these claimants in this case. However, we can do
16 through the four or five that you have -- that you have said
17 that you would allow. So I think maybe that's a non-issue at
18 this point.

19 THE COURT: All right.

20 MR. COHN: And then -- and then finally, Your Honor,
21 when -- when Mr. Schiavoni, in his -- in his motion, refers to
22 the thousand Libby witnesses, here is what he is talking about.
23 There's actually been kicking -- kicking around for months our
24 proposal by way of a stipulation, with the plan proponents, to
25 -- to deal with how -- how we are going to prove insurance

1 rights with respect to confirmation. Because as you know, very
2 important elements of our -- our objections to confirmation
3 have to do with the fact that the Libby claimants have -- have
4 insurance rights.

5 In order to - in order to prove what those insurance
6 rights are, there basically are two things. One is the
7 policies. In fact, we need -- we need to have some preferably
8 stipulation to -- to put copies of the policies into evidence.
9 But the other side of it, Your Honor, is, okay, who are these
10 claimants? What were their periods of exposure? Were they --
11 you know, who -- who were they? Were they community members?
12 Or were they actual employees of Grace? Or were they -- were
13 they family members? Those data are necessary in order to be
14 able to argue who -- who is entitled to coverage, and under --
15 under what policy.

16 So therefore, in order to prove the value of the
17 insurance coverage -- I mean, the coverage itself is just
18 insurance policies. It's a matter of law. You just interpret
19 -- interpret the policy. But -- but the application of the
20 individual -- the individual circumstances to that is something
21 that needs to be proof.

22 Now, the -- the awful way to do it, quite frankly,
23 Your Honor, would be to -- to bring in every one of our clients
24 and have them, you know, testify for what would be about five
25 minutes about, you know, yes, I worked at Grace. These are the

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1 years, what I did, you know, et cetera, et cetera. Rather than
2 do that, it would seem to me that there ought to be a
3 stipulation on this. However, we have -- we have -- as I say,
4 we first proffered this -- raised this issue in March. Traded
5 some drafts, but have not -- have not obtained a stipulation
6 with the plan proponents on this issue. And so that's why the
7 -- we had to add these people to our witness list.

8 THE COURT: So you're asking for a stipulation from
9 the opposing parties that indicate that there are -- how about
10 hypothetically -- that hypothetically there are people who fall
11 within this class, so that you can then make your legal
12 argument. I think the problem -- I mean, unless the claims
13 have been somehow already tendered, there may be an issue about
14 binding the trust at a later time if people haven't already
15 come forward with claims.

16 MR. COHN: Well, first of all, Your Honor, one thing
17 I want to make very clear is that none of what we're talking
18 about would be binding on the trust or on any insurer,
19 because --

20 THE COURT: All right. It's only for confirmation?

21 MR. COHN: It's only -- it's only to deal with how we
22 can avoid having 1,000 people give very brief testimony on the
23 subject of the underlying facts necessary to -- to establish
24 their relationship to these insurance policies.

25 THE COURT: All right.

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1 MR. COHN: And I hear people go falling off to the
2 side, but I -- this is a -- this is a problem of proof that we
3 must solve. And if we can't solve it by some reasonable
4 stipulation, then we need to solve it by offering the
5 testimony. And that's why these people are on the list. Thank
6 you.

7 THE COURT: All right. Well, you don't need 1,000 of
8 them. You only need one in each of whatever policy period you
9 are in order, I think, to make the connection, correct, that
10 you're arguing about?

11 MR. COHN: Well, if you're saying -- if you're saying
12 meaning that we could argue, you know, sample -- you know,
13 sample claimants, then the difficulty with arguing on a sample
14 basis, Your Honor, is that it's always possible in these things
15 for someone to argue that, oh, yeah, if there's one outlier or
16 whatever whose, you know, being prejudiced in one way, that's
17 not -- that doesn't rise to the level of something that the
18 trust distribution procedures have to address.

19 What our argument is, is that we -- is that our
20 people are being systematically deprived; meaning that they --
21 they all or nearly all have valuable insurance rights that are
22 not being taken account of under the TDP. They're not being
23 recognized under the plan. And so that's why we think a broad
24 based stipulation is probably the -- the way to go. And we'll
25 draft it in a way that's not prejudicial to anyone, but that

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1 just lets us establish this just baseline evidentiary building
2 block, if you will, for our -- for our objection.

3 THE COURT: Okay. And the stipulation would be to
4 the effect that there have been people who were injured who
5 would make claims under the policies?

6 MR. COHN: Well, yeah, actually, the way that we --
7 the way that we drafted it was to actually attach -- just
8 attach a list of people which would designate each person as
9 either family member or employee or -- or spouse. That's one
10 column. And then there would be years of exposure. I -- I
11 think that was it, you know. But just --

12 THE COURT: Okay. But -- but the issue -- you're --
13 you're concept of rights under the insurance policies is based
14 on the fact that these are tort claimants who would file a
15 claim to the insurance that's available under the policies,
16 correct?

17 MR. COHN: Well, they -- yes, that they have -- they
18 certainly have direct rights under those -- under those
19 policies pursuant to the argument we just made. But more
20 importantly, for this purpose, Your Honor, Grace -- you know,
21 people have said, remember, it's Grace's insurance? Grace
22 would have rights to recover under its policies for these --
23 you know, on account of these people's claims. And yet,
24 despite the fact that -- that they have these independent
25 rights, and the fact that Grace has these rights to -- to --

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1 because I -- I misspoke when I said "more importantly," Your
2 Honor. I mean, also.

3 The fact is that the trust is going to -- is going to
4 get potentially large recoveries on account of Libby insurance,
5 while the Libby claimants are going to just be kind of thrown
6 -- not just thrown into the pile with everybody else, but --
7 but we say, you know, paid less than they -- than they should.
8 And that's -- that's our -- you know, that's the basis of our -
9 - that's a basis of our insurance related objections. And we
10 need to be able to prove it.

11 THE COURT: Okay. I just wanted to know the scope of
12 what it was you were asking. And if I understand it, the base
13 -- the basis for the stipulation that you're asking for
14 essentially is that there are tort claimants who suffered an
15 injury, who would make a claim under the insurance policies?

16 MR. COHN: Yes.

17 THE COURT: Okay.

18 MR. COHN: Yes.

19 MR. BERNICK: There is a stipulation between the
20 Libby claimants and?

21 MR. COHN: And -- and the plan proponents, because it
22 relates to a confirmation objection.

23 MR. BERNICK: And asking the carriers to stipulate?

24 MR. COHN: We are not asking the carriers to. And we
25 think it should expressly state that it is not binding and not

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1 prejudicial to them, because it's not -- it wouldn't be fair to
2 them to do that in the context of a plan confirmation hearing.

3 THE COURT: Well, the -- yes, the issue is not that
4 they have a claim. It's that they would make a claim, correct?
5 I mean, that's what you're saying, that there are individuals
6 out there who contend that they can prove --

7 MR. COHN: Yeah.

8 THE COURT: -- that they have a claim. But this
9 isn't the time to prove that claim.

10 MR. COHN: Well -- well, yes -- well, it's -- what
11 the stipulation would just do -- it wouldn't even -- it
12 wouldn't even go that far. The stipulation would just provide
13 the basis on which we could argue that under the terms of the
14 insurance policies they have claims. And others could argue
15 that they don't.

16 THE COURT: All right. Okay. Mr. Bernick?

17 MR. BERNICK: I know -- I'm very sensitive to the
18 levitation in the back of the courtroom on this side, and
19 anxious to avoid it because it seems to me that at this point
20 that's kind of a tail-dog situation on -- on the issue that
21 brings us here in item 11. I'd jut like to go through the list
22 that Mr. Cohn went through and -- and to respond to it to see
23 if we can't get to the point where Your Honor can rule on -- on
24 what genuinely remains at issue.

25 First, with respect to medical conditions, Your Honor

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1 basically said, well, come up with four or five people who can
2 talk about their medical conditions. And on the strength of
3 the idea that it's four or five people, we can argue relevance
4 another day, and we can go ahead and take their depositions.
5 We just need to know who those people are. That's something
6 that we need to know before Thursday so that we can wrap it
7 into the schedule. So I would ask Mr. Cohn and Mr. Lewis to
8 think about who the four or five people are, so we can have
9 that discussion sometime between now and Thursday.

10 THE COURT: That would also encompass the issue about
11 working conditions. Those -- Mr. Cohn.

12 MR. BERNICK: Well, I -- working conditions is a
13 different kettle of fish for reasons I'll talk about in just a
14 minute. Then he says, well, we also needed to talk about the
15 value of cases that were settled and how basically they're
16 getting the short end of the stick in the connection with the
17 TDP. I think that that testimony really cannot come in through
18 the individual claimants whose claims were settled.

19 And the reason for that is, not only do they have too
20 little, they also have too much, too much for the reasons that
21 Mr. Laughlin indicated too little, because they only will be
22 able to talk about part of the equation. History shows, and
23 we've been through this many different times, both at the
24 criminal trial, and otherwise, indeed, it's a very basic aspect
25 of personal injury litigation generally. If you ask the

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1 plaintiff what were your exposures, well, you'll get part of
2 the story. Sometimes it will be accurate, sometimes it won't.
3 I mean, talking about events that took place a very, very long
4 period of time ago.

5 So we get a witness on the stand that says, well, I
6 was -- I only had my exposures through the community. And
7 community means something for -- one thing for some people,
8 something else for other people. We went through this ad
9 nauseam for four months in connection with what does a
10 community mean? What does a family exposure mean? Your Honor
11 doesn't need to deal with all that, to say nothing of dealing
12 with it through a witness who is only one part of the equation.

13 The other part of the equation is what their medical
14 records will reflect that they told doctors 20 years ago. It
15 is what their -- what their spouse might say in connection with
16 the deposition. It's a whole bunch of different things. If
17 the ultimate goal of the second point is to talk about what
18 went into the value of settled cases, there's a very simple way
19 in which that can be ascertained. Through records taken from
20 Grace's files and also from the files of Heberling and Lewis
21 regarding the -- the substance of the negotiation. Because
22 that -- everything will be brought to bear in connection with
23 it. That will tell us the fact of what occurred.

24 THE COURT: I thought that's what I said.

25 MR. BERNICK: No, if it's through the testimony of a

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1 witness that is the claimant themselves --

2 THE COURT: No, no, I don't see -- I thought I said I
3 don't understand what the claimant's going to add to this. I
4 think it's going to require -- I was using the word expert
5 testimony. I'll stand corrected to say negotiation -- the part
6 -- the files of the parties who actually participated. I don't
7 see what the claimants can add to the settlement value issue.

8 MR. BERNICK: Okay. That then brings me to -- and if
9 we -- if we have a limited number of those, and they want to
10 talk about a limited number of those, we need to have that
11 discussion, too. Who are the people and, you know, which ones
12 are we talking about, so we realistically can have a process
13 for -- for dealing with them. Again, we're not conceding the
14 relevance of any of that, but by way of discovery, that will
15 certainly cover that base.

16 We then have number three, the discussion of
17 conditions at Libby. And I'm going to Lewis and Heberling in a
18 moment here. Conditions at Libby are entirely irrelevant. We
19 could have -- the question is discrimination unequal treatment
20 -- people -- we could have people coming in from all over the
21 country to talk about the abysmal working conditions they had
22 in connection with exposure to other kinds of Grace asbestos.

23 I'm not saying that it was all that abysmal, but I'm
24 sure that they would come in and say that it was that abysmal.
25 But it adds nothing. It is not material, it's not germane to

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1 any issue. And effectively, it opens the door on cross-
2 examination to all kinds of stuff. It is, again, very partial.
3 It's a witness saying, here's what I saw. Well, here's-what-I-
4 saw always has another part to it, another aspect to it.

5 You end up learning the -- the Libby mining
6 operations in connection with the testimony of a witness who's
7 going back for now 20 years, because the facility shut down as
8 a manufacturing facility in 1990. Completely and utterly
9 irrelevant. It will be -- it will be a -- a distraction and a
10 burden in the discovery process. We would actively and still
11 do actively object to any such testimony as being irrelevant.
12 It's a lot --

13 THE COURT: Well, look, it -- it seems to me that
14 with respect to that issue, if the conditions at the mine
15 somehow or other affect the fairness of the treatment of the
16 Libby claimants, that's the subject matter for expert
17 testimony. Somebody has to tell me why this group of Libby --
18 Libby claimants is being discriminated against as a group of
19 Libby claimants. And if one of the factors is that the
20 conditions at the mine were so terrible there and were not as
21 terrible at other places, then that's one of the factors that
22 they're going to tell me about. But that's the subject matter
23 for expert witnesses, not individual claimants.

24 MR. BERNICK: And -- and I know you're going to get
25 this in connection with the testimony from Dr. Peterson. I

1 mean, there are a whole bunch of different factors that are
2 always out there in the tort system that affect tort system
3 values. If you try to do a complete analysis of any given
4 settlement, with all the different factors that are involved,
5 and then go to the next settlement and the next settlement, and
6 somehow try to figure out exactly what factors weigh in what
7 way, so that you can make a comparison between Libby and other
8 places, you end up with a multiple regression (phonetic) that's
9 probably got 35 different elements. Nobody has ever been smart
10 enough to figure that out. It's never been -- it's never been
11 done.

12 THE COURT: If they have or not, it's the subject
13 matter for expert testimony. We've got 15 minutes left. Let's
14 move.

15 MR. BERNICK: Yes, I -- right, right, well, yeah,
16 this then brings me to -- this brings me then to Messers
17 Heberling and Lewis because that's really where all this thing
18 is really headed, Your Honor. And Mr. Heberling and Mr. Lewis,
19 if they testify as fact witnesses about what actually occurred,
20 you know, that's up to them. But then we're going to face the
21 same problem that we had previously, which is, what about their
22 files? Because --

23 THE COURT: They're going to have to produce them.

24 MR. BERNICK: They're going to have to produce their
25 files. And privilege and all the rest of that stuff -- you

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1 know, again, if we're talking about the same -- you know, same
2 number of people, who is it -- who -- which cases are going to
3 be the famous settled cases? Which ones are they? How many?
4 And what files are going to be produced from Heberling and from
5 Lewis without privilege objections? That's the fact side.

6 Now on the expert side, I would venture to say this
7 is why I want to prolong the agony one minute longer. We don't
8 have an expert report for these individuals at all; that is
9 Heberling and Lewis. That when it comes to the expert work
10 that would have to be done, they'd have to be sitting there
11 doing comparisons. They can't do a -- they can't say Libby is
12 getting the short end of the stick without saying in reference
13 to something else. Are they also experts on non-Libby claims
14 that have been settled, so that they can say, oh, we're not
15 being treated the right way? I don't think so. I don't think
16 that they have that expertise. They certainly don't have an
17 expert report that says it. And it seems to me that to take
18 them down the road of doing that is an impossibility at the
19 present time.

20 I think, really, when push comes to shove, the way
21 that this has been handled -- this is not a new issue. Indeed,
22 the whole TDP has been developed over years and years and years
23 and years, where the values that are in the TDP are matched to
24 tort system values in a fashion that has almost become an art
25 form. And Dr. Peterson knows about this, and he'll testify

1 about it.

2 The real issue is, what happened with respect to the
3 Libby people? And are the Libby people being treated unfairly
4 or were they discriminated against as a group in that little
5 art form? I don't think that Mr. Heberling -- and I know that
6 -- I know Mr. Heberling and I know Mr. Lewis don't have the
7 qualifications and they don't have the background to make that
8 comparison. And that's why we don't have an expert report is
9 why they're not experts in the field.

10 They're both very capable trial lawyers, and they're
11 both very capable lawyers and advocates for their clients. But
12 it seems to me that the only way that the Libby claimants at
13 this point, given what they've chosen to do with the experts to
14 address that issue, is by using claim files for settled claims.
15 We're not talking about existing claims. Existing claims,
16 which they say that Lewis and Heberling are going to address --
17 and you talked about -- I mean, how you can sit there and value
18 an existing claim. Give me a break. You know, I mean, that --
19 that's a whole new area of looking into a crystal ball and
20 saying, so and so client's claim is going to be worth X. No
21 expert report, no competence for doing that.

22 I think that this is really a lawyer's argument point
23 that they know what went into our TDP, that they know their
24 client files that have been settled. We got to figure out what
25 the client files are that they're going to say demonstrates

1 that the Libby people are being discriminated against. Tell us
2 what the files are, you know, by Thursday, so we can deal with
3 that.

4 And essentially, what you're talking about is
5 argument to the Court and cross-examination of our TDP. I say
6 our TDP. Their TDP. It's a -- it's a argument of lawyers in
7 court. If Mr. Heberling takes th stand or Mr. Lewis takes the
8 stand to and say, I don't think that this is fair, they're
9 essentially not doing anything different from what, you know, a
10 score of lawyers in this courtroom could do working with claim
11 files. People deal with claim files every day of the week.

12 So our proposal would be, give us the four or five
13 people on medicals by Thursday; give us the settled cases where
14 you want -- where we want to introduce the claim files by
15 Thursday. We can figure out a schedule for -- for dealing with
16 that and deposing the people. And then we're really talking
17 about a matter of legal argument.

18 With respect to the insurance rights, the insurance
19 rights is basically a question of standing. They want to say
20 they have standing to contest the treatment of insurance.
21 They're not going to establish that they've actually got
22 coverage in this case and that those rights, in -- in fact,
23 exist and are being compromised. What they're really saying is
24 that they have standing to complain about the disposition of
25 the insurance. And I don't think we really need very much to

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1 establish standing. I don't think we need a bunch of people
2 coming and talking about, oh, I was exposed during X period of
3 time.

4 So that's all that I really have. I think that with
5 that -- that in place, we can keep on moving forward.

6 THE COURT: Mr. Lewis, any -- any problem with
7 Thursday for designating whatever client files and for the
8 witnesses?

9 MR. LEWIS: No, Your Honor. I would point out one
10 thing. We do have the deposition of Mr. Hughes (phonetic),
11 which is a 30(b)(6) deposition. And in his testimony, he
12 agreed that the average settlement in Libby was \$268,000, based
13 on the records. And that the average settlement elsewhere in
14 the United States was between 2 and 4,000, depending upon how
15 you tweak the numbers. But that's what he said. He also
16 indicated that the reason that Grace paid more in Libby was
17 multifaceted. One of them being that generally the only source
18 of asbestos or the 99 or 95 percent source of asbestos in Libby
19 was Grace.

20 So there were not other defendants who -- against
21 whom these people could recover. Whereas, in the normal cases
22 around the country, there are -- were multiple defendants
23 against whom --

24 THE COURT: Yes, I -- I've read the portions that
25 you've submitted.

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1 MR. LEWIS: So -- so anyway, that's what this is
2 about. We can meet these deadlines, and we'd like to work with
3 everybody to keep this as simple as possible. And -- and I
4 guarantee you, the last thing I want to do is testify before
5 any Court, because lawyers do better on this side of -- of
6 things than in a witness stand. So if that can be resolved,
7 we'd like to do that. The difficulty is, we have to put on
8 proof that at least supports our theories in the case.
9 Regardless of whether they prevail, we need to get proof of
10 what we're trying in this case.

11 THE COURT: All right. If you can work an order out
12 that resolves this motion in the method that I've just
13 indicated before Thursday, that's fine, you can submit it on a
14 certification of counsel. Otherwise, I'll just assume that
15 we'll -- you'll tell me on Thursday when an order will be
16 coming in.

17 MR. LEWIS: Thank you, Your Honor.

18 MR. BERNICK: That brings us to item 13, which is the
19 motion to file a supplemental objection by the Libby claimants.
20 And the supplemental objection has four basic bullet points.
21 Three of them get back into this medical arena. And I think,
22 Your Honor, that I had a longer presentation to make, which I
23 will not make, but we -- we really have a -- a moving target
24 problem here that the -- the evidence that's -- you know, the
25 -- we just submitted a report for Dr. Weil on Friday. We -- we

1 gave all that we could. But since -- since even Dr. Weil --
2 the scope of what he was going to talk about was defined.

3 We now have a supplemental report by Dr. Moolgauker,
4 who's their epidemiologist. On July 14th, we get a production
5 of X-rays and HRT -- HRCT's for 17 clients, and then has to
6 come to this process because, otherwise, we can't complete our
7 expert work. We're trying to. We can't complete our expert
8 work.

9 So the supplemental objections that are being filed
10 now are supplemental objections that raise yet new medical
11 issues. And I'm not really terribly -- well, we oppose the --

12 THE COURT: Didn't I set deadlines for all of this?

13 MR. BERNICK: Yes.

14 THE COURT: I mean, I had a deadline for a reason.
15 That was so I don't have to have these arguments. So I'm not
16 sure why at this point anybody is acting outside the deadline.
17 But what's good for the goose is good for the gander. It's
18 going to apply evenly to everybody.

19 MR. BERNICK: Okay. So we'll take this up, in the
20 interest of time, with Mr. Cohn between now and Thursday. I'm
21 not sure what there is to be done, but one of the things we're
22 going to have to talk about on Thursday is bringing this
23 medical thing to a conclusion. It's been extremely robust. We
24 need to finish our expert reports so that they get them. They
25 need to take the deposition of Dr. Weil, which has been

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1 postponed, because the work has been ongoing, because their
2 work has been ongoing. And I don't take -- I don't blame
3 anybody, it's just that we got to bring it to a conclusion. So
4 maybe we should defer this issue for -- until the discussion on
5 Thursday.

6 THE COURT: That's fine. And see if you can get some
7 specific dates by which everything is to end, because I thought
8 it was done.

9 MR. BERNICK: Yes, I understand that. And we're not
10 agreeing to this, but rather than -- I'm very anxious to use
11 the last 15 minutes to talk about the pretrial order, and I'll
12 just follow Your Honor's lead. We object to these supplemental
13 objections for the reason that they are not timely filed, and
14 they raise new matters. I don't even know -- well, they raise
15 new matters in the objection that we don't believe are -- are
16 timely.

17 THE COURT: All right. Regardless, work with Mr.
18 Cohn, please, to see if you can get dates by which nothing more
19 is going to be supplemented at. You know, these reports by way
20 of the basic information have to stop in order to get to trial.
21 And this continual supplementation is not -- it's simply not
22 appropriate. By now you ought to know your basic case and who
23 your -- who your witnesses are going to be. So I'll continue
24 number 13 till Thursday.

25 MR. BERNICK: Okay. Three minutes on agenda item

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1 number 10, which is the -- which is the status report on phase
2 one. Mr. Lockwood (phonetic) will use 15 seconds, because he's
3 just told me he's going to be -- he'll talk about what's going
4 on with the insurers.

5 THE COURT: I'm sorry, what agenda number?

6 MR. BERNICK: This is the agenda item number 10.

7 THE COURT: Okay.

8 MR. BERNICK: This is the status on phase one. And
9 the bottom line is that the briefs regarding default interest
10 -- on impairment on default interest, they've all been
11 submitted. No surprise, there are yet new arguments that at
12 least are being featured prominently now that weren't before.
13 And -- and our suggestion, Your Honor, is going to be to have a
14 further argument with regard to impairment. Because it's
15 become -- you know, there's yet no new material that's out
16 there.

17 If Your Honor prefers not to have that, we probably
18 will have some other things to address in our August 7 trial
19 brief. But -- but I think it may actually -- and I'm not
20 necessarily always in favor of these kinds of things. I think
21 it may be advantageous to have a further argument with regard
22 to impairment.

23 THE COURT: Can it be done at the next omnibus?

24 MR. BERNICK: Next omnibus is what date?

25 COUNSEL: August 24th.

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1 MR. BERNICK: Answer is yes.

2 THE COURT: All right. Put it on for the next
3 omnibus for supplemental argument to the -- no?

4 MR. COBB: Your Honor, I can do it on the 24th, but I
5 mean, this -- at a certain point, as Your Honor has been
6 saying, of late -- it's all before you. I -- I don't know what
7 to say.

8 MR. BERNICK: Well --

9 MR. COBB: Mr. Bernick would like to talk some more,
10 so I'm happy to join him and talk some more, too.

11 MR. BERNICK: I -- I think I'm not the only one that
12 takes pleasure in addressing the Court. It's not a question --
13 I mean, these are all new arguments, frankly, that are being
14 raised by the lenders. And so if we actually rolled -- oh,
15 look, guess who wants to talk again. So --

16 THE COURT: That's fine. Look, the answer to this
17 one is, I'll hear whatever argument you need to make on August
18 24th. I'm limiting each side to 15 minutes.

19 MR. BERNICK: That's fine. Insurance -- Peter, do
20 you want to talk about insurance briefly, and then we'll talk
21 about pretrial order.

22 MR. LAUGHLIN: Your Honor, the plan proponents have
23 filed papers taking the position the insurance neutrality
24 changes that they filed after the hearing were adequate to
25 satisfy the law and the Court. The insurers are taking the

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1 position that that's not the case. And we're going to be
2 having some discussions about that. And we'll see where we go.
3 But for the moment, at least, everybody's said everything to
4 the Court, that I'm aware of, on that subject that they have to
5 say.

6 THE COURT: Okay. So what is it that you need from
7 me?

8 MR. LAUGHLIN: Nothing. That's a status report. You
9 had told us at the last hearing that you encouraged us to be
10 having discussions.

11 THE COURT: Yes.

12 MR. LAUGHLIN: And we will be having those
13 discussions. We've had some preliminary discussions. We're
14 going to have some more.

15 THE COURT: All right. Well, give me another status
16 report at the next omnibus.

17 MR. LAUGHLIN: Yes, Your Honor.

18 THE COURT: Thank you.

19 MR. BERNICK: On the pretrial, which is item number
20 9, I think it's basically a pretty good new story that a lot of
21 the uncertainty and, I'll call it -- well -- choppiness of the
22 phase one pretrial, I think, will be obviated with respect to
23 phase two. I say that optimistically, but I think that there's
24 certainly material out there that would lend credence to that
25 optimism.

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1 THE COURT: Make sure you build into that order dates
2 by which pretrials are going to be submitted to this Court,
3 please.

4 MR. BERNICK: This is it.

5 THE COURT: Oh, this is the -- no, I mean, a -- don't
6 -- aren't you going to want a pretrial or maybe not, maybe I
7 just thought you would -- at -- right shortly before the case
8 commences?

9 MR. BERNICK: Well, I think we probably will. But --

10 THE COURT: Trial commence --

11 MR. BERNICK: But this was supposed to be at least
12 the first of the pretrials.

13 THE COURT: No, I'm talking about pretrial
14 narratives.

15 MR. BERNICK: Oh, narratives?

16 THE COURT: Statements.

17 MR. BERNICK: Well, we have trial briefs that --

18 THE COURT: The trial briefs, yes.

19 MR. BERNICK: Yeah, they -- they --

20 THE COURT: But I want -- I want the list of exhibits
21 pre-marked for identification.

22 MR. BERNICK: We got that.

23 DEPUTY CLERK: That was all filed on the 20th.

24 THE COURT: It was? Oh, okay. I just haven't seen
25 it yet.

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1 MR. BERNICK: Okay. So that's what I'm really
2 talking about. So just to be clear, Your Honor -- I know
3 there's a lot of things going on.

4 THE COURT: I saw exhibit lists. I saw a statement
5 that indicated who the witnesses were going to be and what
6 issue they'd testify and a list of documents.

7 MR. BERNICK: Yes.

8 THE COURT: But I haven't seen the documents.

9 MR. BERNICK: Correct. And that's --

10 THE COURT: Okay.

11 MR. BERNICK: -- that's now going to be in the case
12 management order. Do we have a -- do we have a line item for
13 the submission of all the --

14 THE COURT: That's what --

15 MR. BERNICK: -- binders to the Court?

16 THE COURT: That's what I'm asking for.

17 DEPUTY CLERK: We do.

18 MR. BERNICK: Yeah. Yes.

19 THE COURT: Okay. Fine.

20 MR. BERNICK: Yeah, okay. So the -- the state of
21 play is roughly this. The trial briefs have been filed by the
22 objectors. There's one trial brief that was deferred, and
23 that's on best interest by the Libby claimants, and I think
24 they get into a little bit later, in light of the testimony of
25 Ms. Zilly (phonetic), which has yet to taken with respect to

1 best interest. But -- but essentially, the trial briefs have
2 been submitted.

3 Our trial briefs are due on the 7th of August. The
4 pretrial submissions have all been made pursuant to Your
5 Honor's suggestions. And there have been 34 different
6 submissions that have been made by parties to the case. We
7 counted them up, de-duped them. There are 730 exhibits. And
8 while that sounds like a lot, there's actually some room for
9 optimism there as well. The plan proponents have about 270
10 exhibits. So that covers the waterfront.

11 There are a lot of kind of voluminous exhibit lists
12 that are really driven by, I think, a need to have completeness
13 on -- on policies and the like. Kanab has 68 exhibits; BNSF
14 has 91 exhibits. They're mostly contracts and related
15 correspondence. Anderson Memorial is 7 -- 37; and Libby is 77.
16 So they're at least manageable populations of documents.

17 One of the things that the proposed CMO does is to
18 say that rather than having the exhibits submitted later among
19 -- exchanged among the parties -- they're listed but they're
20 not exchanged -- that they ought to be exchanged much -- much
21 sooner. So we're calling for that by August 10th. And the
22 reason is that the faster that we have them, the faster we're
23 able to really see what some of these things are. Some of
24 these things we've just never seen before at all. There are a
25 total of 91 live witnesses who have been listed, but 39 of them

1 are listed Libby claimant. So we think that that number is
2 going to shrink significantly.

3 So all this material is there. There are basically
4 two matters to take up. One was how to organize the trial, and
5 the other is how to get there. How to get -- there's the CMO.
6 The CMO basically follows a very traditional format of getting
7 exhibits, deposition -- or deposition designations, motions in
8 limine, Dalbert, all the way down the road. It will include
9 the submission of the documents to the Court. I'm not going to
10 go over that today. We'll talk about that on Thursday.

11 With respect to the overall structure of the trial,
12 this is simply an idea from the debtor, nobody else. But there
13 are different ways to, quote, skin the cat. One is to have the
14 plan proponent simply go first and address all issues that the
15 plan proponents want to address, then to have the objectors,
16 one by one, come up and make their objections. And we can
17 certainly proceed in that fashion.

18 I think it will be extremely difficult to -- to time
19 the case, to structure the case, and to have Your Honor
20 consider testimony at about the same time when testimony
21 relates to the same subject. So Grace only thinks that --
22 although, I don't -- I don't dismiss the possibility that
23 others will see the light -- believes that the best way to
24 proceed is to start with the discrete subject matters first,
25 and to kind of push the more general issues to the back end.

1 So Libby would go first. And the Libby people would put on
2 their objections. And then we would respond to the Libby
3 objections. And that probably will take the longest of all of
4 these segments.

5 My hope is we can be done in a couple days, but it
6 may take two-and-a-half, maybe three days, unfortunately.
7 Unless something gets limited, I think that that's what it's
8 going to do. The lenders would be next. I think that the
9 lenders will be much shorter. A lot of it's coming in by way
10 of record testimony. But then there is also live testimony.
11 And I think that the witnesses are likely to be fairly short,
12 in large part because Your Honor is mostly familiar with what
13 all of this is anyhow. We may have some issues about whether
14 people need to be brought live. It is the debtor's position
15 that this is a distinct phase and for a distinct purpose in the
16 confirmation, and that people need to be prepared to testify
17 live.

18 So we've indicated this, and this is something that
19 we'll be talking about with Mr. Pasquale and Mr. Cobb in the
20 course of our always productive discussions. But we think the
21 lenders could probably be done in a day. We hope so.
22 Insurance -- broad group of people. But it actually turns out
23 there is a relatively limited number of live witnesses. So
24 there are three experts, and I think that there are about maybe
25 six or eight other fact witnesses that have listed. We don't

1 know that they'll all be called.

2 Indirect claimants is the next category that picks up
3 the likes of BNSF, Scott (phonetic), Garlock. There are --
4 there are some -- live witnesses have been identified, and
5 that's really what drives my time estimates on all this is
6 purely the live testimony. There are a number of people that
7 have been identified. We think it's going to be handleable.
8 We hope that not all of them are called. We think that can be
9 done in less than a day. Anderson, less than a day. All of
10 their issues.

11 I think we'll then be down to -- when I say all of
12 their issues, very generic kinds of live testimony. Probably
13 mostly from the plan proponents. Feasibility is an issue that
14 would occur, if it did occur, in that last category. We, I
15 think, just produced a -- an expert report on feasibility, if
16 memory serves, on Friday. We hope that the content of that
17 report is such that this does not really emerge as a major
18 issue. But this is the basic order that we're proposing. We
19 think it can be done in the days that the Court has allotted.
20 It's going to be tight.

21 And I think that -- I think that because it's going
22 to be tight, Your Honor is going to have to set some time
23 limits perhaps for certain segments of the process.

24 THE COURT: Well, I think you folks ought to talk
25 about it between now and Thursday. And I will propose to set

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1 some time limits. I think it's probably going to take a few
2 more days, or at least another day, maybe two, than are
3 currently built into the schedule. But I'll take a look at the
4 schedule, too.

5 MR. PASQUALE: Your Honor, just one question. Ken
6 Pasquale for the Committee. I'm sure everyone is thinking the
7 same thing. And I'll address the Court, but it really is a
8 question for Mr. Bernick. There are a number of witnesses that
9 the plan proponents have listed that come up in a number of
10 these categories. I'm -- if we take it issue by issue, are the
11 plan proponents going to produce the same witness more than
12 once? How is this going to work?

13 COUNSEL: Yeah, that -- that is a very good question.
14 It's already been raised within what would otherwise seem to be
15 the seamless cooperative spirit that binds the plan proponents.
16 Because I know that a certain very famous lawyer, Elihu
17 Ezekiel, is one of the witnesses. We want to make sure that he
18 comes back, like in Chicago voting, you know, early and often.

19 THE COURT: So you're going to produce him for every
20 category?

21 COUNSEL: No, the -- the goal is -- is not -- is to
22 minimize that. We think it's inevitable that it will be some
23 of it. I think, for example, Libby and the lenders, kind of at
24 the edge of that are some of the same people who are going to
25 be talking about claim value and solvency and TDP. But

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1 certainly to the extent that Grace people who are listed more
2 than once need to come in for more than one appearance, we will
3 certainly do that.

4 So the idea is not to force the testimony of anybody
5 on the subject matter kind of out of order. But that's
6 something that's still in process. We have to talk with --
7 with people about it. I -- I just don't see -- I mean, the
8 price to be paid for avoiding that is just -- the
9 intelligibility of the process for the Court and its -- and the
10 efficiency of the process, I just -- I just don't see a way of
11 being -- keeping the Court's, you know, focus and the parties
12 focus on the subject matter while we're just taking testimony
13 on something else.

14 THE COURT: Okay. It probably would be helpful if
15 they are produced multi times, but to the extent they're not
16 available for production multiple times, I think you should
17 state that up front, so that all parties know.

18 COUNSEL: Yeah.

19 THE COURT: Because in this phase, it's possible,
20 perhaps, that while Libby is presenting it's case -- I'm just
21 hypothesizing, I'm not making findings, obviously -- that maybe
22 Anderson doesn't want to appear for that segment because there
23 might not be anything relevant. So I think you need to
24 identify the fact that certain witnesses will be recalled or
25 will not be recalled, so that all parties make sure they're

1 there for the portions of the testimony they want to hear.

2 COUNSEL: I think one witness, for sure, that won't
3 be able to be here more than once is Dr. Mark Peterson, for
4 personal reasons related to his wife's health, but -- and this
5 is a point of clarification. I think what Mr. Bernick was
6 proposing, that if we do it this way, that the plan proponents
7 would put on their evidence related to each issue first,
8 followed by the plan objectors, and not vice-versa.

9 MR. BERNICK: Well, with respect to Libby, they're
10 just objectors. I think they would go first under objections.

11 THE COURT: Folks, you need to work this out.

12 COUNSEL: Okay.

13 THE COURT: And we'll continue this till Thursday.
14 Okay. All right. Where -- is there anything else between now
15 and Thursday

16 COUNSEL: Your Honor, did you get a copy of the
17 fourth amended CMO? I -- I had tried to arrange to send it
18 over.

19 THE COURT: No.

20 COUNSEL: Then I'll give it to you right now.

21 THE COURT: Okay. All right. We're adjourned.
22 Thank you.

23 (Proceedings concluded at 1:27 p.m.)

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C E R T I F I C A T I O N

We, Maureen Emmons, Josette Jones and Brenda Boulden,
court approved transcriber, certify that the foregoing is a
correct transcript from the official electronic sound recording
of the proceedings in the above-entitled matter.

_____	_____
DATE	MAUREEN EMMONS
_____	_____
DATE	JOSETTE JONES
_____	_____
DATE	BRENDA BOULDEN